(19,312.)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1904.

No. 237.

W. L. WELLS COMPANY, PETITIONER,

vs.

GASTONIA COTTON MANUFACTURING COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.

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TRANSCRIPT OF RECORD.

United States Circuit Court of Appeals,

FOURTH CIRCUIT.

No. 469.

GASTONIA COTTON MANUFACTURING COMPANY,
PLAINTIFF IN ERROR,

versus

W. L. WELLS COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA, AT CHARLOTTE, N. C.

Record Filed September 24th, 1902.

[Stamp:] Clerk's Office, U. S. Circuit Court of Appeals, Fourth Circuit. H. T. Meloney, Clerk, Richmond.

TRANSCRIPT OF RECORD.

THE UNITED STATES OF AMERICA,
Western District of North Carolina, } To-wit:

At a Circuit Court of the United States for the Western District of North Carolina, begun and held at the Courthouse in the city of Charlotte, on the second Monday of June, being the 9th day of the same month, in the year of our Lord, one thousand, nine hundred and two.

Present: The Honorable James E. Boyd, Judge of the Western District of North Carolina.

Among other were the following proceedings, to-wit:

No. 384.

W. L. Wells Company
vs.
Gastonia Cotton Manufacturing Company. } At Law.

Theretofore, to-wit: On the 7th day of October A. D., 1901, the plaintiff files in our said Circuit Court of the United States a bond for costs as follows, to wit.:

BOND FOR COSTS.

UNITED STATES OF AMERICA,
Western District of North Carolina. }

Whereas W. L. Wells Company has brought the above entitled action against the Gastonia Cotton Manufacturing Company, the defendant above named, and desires to give the undertaking required by law to secure the costs;

Now, therefore, W. L. Wells Company, as principal, and the United States Fidelity and Guaranty Company, as surety, undertake in the sum of two hundred dollars that the plaintiff shall pay to the defendant all costs that may be adjudged against the plaintiff,

2 in favor of the defendant in the above entitled action, not exceeding the sum of two hundred dollars.

Oct. 4th, 1901.

W. L. WELLS CO.,
By JONES & TILLETT, Attys.
THE UNITED STATES FIDELITY & GUARANTY CO. OF M. *D.*,
By J. W. COBB, Atty.

Endorsement:

Filed in this office Oct. 7th, 1901.

H. C. COWLES, Clerk.

SUMMONS.

UNITED STATES OF AMERICA, WESTERN DISTRICT OF NORTH CAROLINA, CIRCUIT COURT, FOURTH CIRCUIT.

W. L. Wells Company, Plaintiff, *against* Gastonia Cotton Manufacturing Company, Defendants. } Summons.

The President of the United States of America, to the Marshal of the Western District of North Carolina—Gree-ing:

You are hereby commanded to summon Gastonia Cotton Manufacturing Company, citizen and resident of the Western District of North Carolina, to appear before the judges of the Circuit Court of the United States, at the next term of said court, to be held for the district aforesaid, at Charlotte, on the second Monday in December next, then and there to answer to the complaint of W. L. Wells Company, the plaintiff herein, citizen and resident of the State of Mississippi, which complaint will be filed in said court within the first three days of said term. And let the said defendant take notice, that if it fail to answer the said complaint within the time limited by law, the plaintiff will apply to the court for the relief demanded in the complaint.

Herein fail not, and have you then and there this summons.

Witness, the Hon. Melville W. Fuller, Chief Justice of the Supreme Court of the United States, at Charlotte, in said district, the

3 7th day of October, 1901, and in the 126th year of the Independence of the United States.

[Seal of U. S. Circuit Court.] H. C. COWLES,
Clerk U. S. Circuit Court Western District of North Carolina.

Original.

MARSHAL'S RETURN TO SUMMONS.

Received Oct. 8th, 1901.
Executed by delivering copy to John F. Love, this Oct. 8, 1901.

J. M. MILLIKAN,
U. S. Marshal.
By B. N. HAMPTON, D. M.

Endorsement:

Filed in this office Oct. 11, 1901.

H. C. COWLES, Clerk.

COMPLAINT.

UNITED STATES OF AMERICA, WESTERN DISTRICT OF NORTH CAROLINA, CIRCUIT COURT, CHARLOTTE.

No. 384.

W. L. Wells Company, Plaintiff,
vs.
The Gastonia Cotton Mfg. Co., Defendant. } Complaint.

The plaintiff complaining of the defendant alleges:

I. That the plaintiff is a corporation created and duly organized under the laws of the State of Mississippi, and is a citizen and resident of the said State of Mississippi, and the defendant is a corporation created and duly organized under the laws of the State of North Carolina, and is a citizen and resident of said State of North Carolina, in the Western District thereof.

II. That during the months of October, November and December, in the year 1899, and in the months of January, June, October, November and December, in the year 1900, the plaintiff sold and delivered to the defendant 2,483 bales of cotton, for which the de-

4 fendant agreed to pay the plaintiff the sum of $111,365.59, together with 6 per cent. interest after thirty days from the date of each invoice of cotton so delivered, a detailed statement showing the date of each invoice, the number of bales of cotton and the amounts due thereon is set forth *forth* in the exhibit herewith filed, marked Exhibit "A."

III. That there has been paid on the said indebtedness the sum of $75,967.60, as shown by Exhibit "B.," herewith filed and made a part of this complaint.

IV. That there is still due the plaintiff on said indebtedness the sum of $35,397.99, with interest at the rate of 6 per cent. upon the deferred payments after thirty days from the date of the respective invoices.

Wherefore the plaintiff demands judgement against the defendant for the sum of $35,397.99 with interest thereon at the rate of 6 per cent. as stated in the complaint, and for the costs of this action to be taxed by the Clerk of this Court.

MURRAY F. SMITH,
JONES & TILLET,
Attorneys for Plaintiff.

STATE OF MISSISSIPPI,
County of Warren, City of Vicksburg.

This day personally appeared before me this day T. G. Birchett, Jr., a notary public, in and for the City of Vicksburg, County of Warren and State of Mississipppi, W. L. Wells, who, being by me duly sworn, says that he is an officer of the plaintiff, to-wit, its President: that he has read the foregoing complaint and the sam*E* is true of his own knowledge except as to those matters therein stated upon information and belief, and as to those matters, he believes it to be true.

W. L. WELLS.

Sworn to and subscribed before me this 5th day of October, 1901. Witness my hand and notarial seal.

(NOTARIAL SEAL.) G. T. BIRCHETT, JR.,
Notary Public.

5

"EXHIBIT A."

Gastonia Cotton Manufacturing Company,

in account with

W. L. Wells Company.

1899.								
Octo.	19	To invoice	100	B-C	to N-Y			$3,884.32
"	20	" "	56	"	"		$2,005.04	
"	20	" "	123	"	" Leo-N & Ale-X	5,328.40		$7,333.44
"	21	" "	100	"	" N-Y			4,011.04
"	23	" "	100	"	" Pi-K			3,971.60
"	28	" "	100	"	" to N-Y		4,082.08	
Nov.	1	" "	96	"	" Bla-K			3,708.41
"	2	" "	50	"	" to N-Y			2,121.20
"	22	" "	86	"	" Leo-N			3,405.44
"	24	" "	50	"	" Zur-I & AE-T			1,781.80
"	28	" "	100	"	" to N-Y		4,082.08	
"	28	" "	100	"	" to N-Y		4,004.16	8,086.24
Dec.	2	" "	86	"	" Rai-N			3,313.61
"	5	" "	92	"	" Ben-D			3,370.37
"	13	" "	100	"	" Nat-I			3,892.76
"	22	" "	107	"	" Iro-N			4,023.94
1900								
Jany.	11	" "	50	"	" Tap-E			1,961.93
"	27	" "	55	"	" Acm-E			2,338.77
June	22	" "	64	"	" Dod			3,283.18
Octo.	2	To invoice	50	B-C	Lin-E			2,814.13
"	11	" "	50	Edn-A				2,764.19
"	20	" "	50	"	" Hob-S			2,660.67
"	25	" "	1000	"	" Jeso-O			5,263.89
"	29	" "	50	"	" Juli-O			2,648.60
Nov.	5	" "	100	"	" Jol-I			5,193.92
"	15	" "	50	"	" Jile-I			2,637.84
"	21	" "	100	"	" " Jit-L			5,190.82
"	24	" "	100	"	" Luk-E			5,276.24
"	26	" "	100	"	" Fug-O		$4,862.35	
"	26	" "	100	"	" Pol-K		4,954.48	9,816.83
Dec.	4	" "	24	"	" Act			1,229.13
"	18	" "	100	"	" Mbr & Moh			5,381.28
Total			2,483					$111,365.59

6

"EXHIBIT B."

Gastonia Cotton Manufacturing Company,
in account with
W. L. Wells Company.

CREDITS.

1899		
Nov. 17,	By cash remittance	$9,212.72
Dec. 6,	" " "	9,987.68
1900.		
Jan. 13,	" " "	8,086.24
" 22,	" " "	3,708.41
Mch. 12,	" " "	7,308.44
June 5,	" " " ($16,000 Recd 1-2 crd Avon Mills)	8,000.00
" 22,	" " " ($10,000 Recd. 1-2 crd Avon Mills)	5,000.00
Aug. 3,	" " "	3,283.18
Oct. 11,	" " "	2,814.13
" 29,	" " "	5,424.86
Nov. 20,	" overcharge freight 50 B @ Ail-I	22.50
Nov. 21,	" cash remittance ($25,000 Recd. $15,000 crd Avon Mills)	10,000.00
Dec. 3,	" " "	3,106.41
1901.		
Jan. 8,	" Overcharge freight from West Point	13.03
	Balance	35,397.99
		$111,365.59

To balance due $35,397.99

Endorsement: Filed in this office, Oct. 7, 1901.
H. C. COWLES, Clerk.

ORDER EXTENDING TIME TO ANSWER.

UNITED STATES OF AMERICA, WESTERN DISTRICT OF NORTH CAROLINA, CIRCUIT COURT, CHARLOTTE.

No. 384.

W. L. Wells Company,
Plaintiff,
versus
Gastonia Cotton Manufacturing Company,
Defendant.
} Order.

In the above entitled case, upon motion of Burwell, Walker & Cansler, Attorneys for the Defendant, it is ordered by the court that

7 the time for filing the answer to the complaint be, and the same is, hereby extended until February 1, 1902, as of this term.

JAS. E. BOYD,
United States Judge.

Endorsement:

Filed in this office, Dec. 9, 1901.

H. C. COWLES, Clerk.

ANSWER.

UNITED STATES OF AMERICA, WESTERN DISTRICT OF NORTH CAROLINA, CIRCUIT COURT, CHARLOTTE.

W. L. Wells Company, Plaintiff, *versus* Gastonia Cotton Manufacturing Company, Defendant. } Answer.

The defendant answers the complaint filed in this action and says:

1. It admits that defendant is a corporation duly organized under the laws of North Carolina, and is a citizen and resident of that State. It says it has no knowledge or information sufficient to form a belief as to the truth of the allegation contained in the first section of the complaint, to-wit, that the plaintiff is a corporation organized under the laws of the State of Mississippi and a citizen and resident of that State, and, therefore, it denies the said allegation.

2. Answering the allegations contained in the second section of the complaint, the defendant says that, during the months of October, November and December in the year 1898, the defendant, by its duly authorized officers and agent, agreed to purchase from one W. L. Wells the number of bales of cotton set out in Exhibit "A" of the complaint, and said therein to have been sent to this defendant by the plaintiff during those months. It admits that its duly authorized officers and agents promised said Wells to account for said cot-on at the prices set out in said exhibit, and it further admits that the weights of the said bales of cotton are therein correctly stated. It further admits that during the months of January and June of the year 1899, the defendant, through its duly author-

8 ized agent, agreed to purchase of the said Wells other bales of cotton, as set out in "Exhibit A" and to account thereofr at a price and upon terms agreed upon between the said Wells and defendant's agent. It further admits that the weights of said bales of cotton are correctly stated on said exhibit. It further admits that, during the *the* months of October, November and December, 1900, through its authorized *a*agent, it agreed to purchase of the said Wells the bales of cotton set out on said exhibit, and the said ba*e*ls of cotton were duly received by the -fendant on the invoices from a corporation or partnership styled the W. L. Wells Company.

3. Answering the allegations contained in the third section of the complaint, the defendant says that there has been paid by it, on account of the cotton purchased by it as aforesaid, a much larger sum than $75,967.60, to-wit the sum of $95,828.11. The defendant admits that it owes, on account of said cotton, a balance of $7,285.46, the same being the difference between the sum which it agreed to pay for all of said cotton, and the amount paid by it under the contract of purchase.

4. The defendant says that the allegation contained in the fourth section of the complaint is not true.

And further answering the complaint this defendant says that, at the time of the agreements to purchase the cotton described in the complaint, the officers and agents of this defendant, who had the management of its affairs, were John F. Love and Geo. A. Gray, and that these individuals were largely interested in the promotion of a manufacturing plant to be established near the t*w*on of Gastonia, where the defendant's mill was situated, and W. L. Wells, in order to secure the sale of said cotton to the defendant, agreed with the said John F. Love that, if he, as agent of the defendant, would agree to purchase cotton from the said Wells, or from the partnership or corporation represented by him, a portion of the purchase money due for the said cotton might be invested in the stock of the said proposed manufacturing plant, which was known as the Loray Mills, and defendant avers that the said cotton was purchased by its agent and manager with the express understanding that the defendant should use a part of the purchase money in that way, and defendant says that, pursuant to this understanding and agreement, a full settlement was made between it and the plaintiff on August 3rd, 1900, and all the cotton shipped by the plaintiff and received by the defendant under the said contract with the said Wells was fully accounted for on that day, in s*r*ict ac-ordance with the terms of the contract.

And defendant further says that another settlement was made on December 3rd, 1900, and all that was due on account of the cotton

9 to that date was fully accounted for in strict ac-ordance with the terms of the said contract.

That, afterwards, to-wit, in January, 1901, the defendant's agent, according to the terms of the agreement, paid out, on account of said cotton, to the manufacturing enterprise known as the Loray Mills, all that was then due on account of said cotton, except the sum of $688.08, and it admits that thereafter, it received the cotton invoiced to it on December 4, 1900, twenty-four bales, for which it owes $1,229.13; and it further admits that it received the cotton invoiced to it on December 18, 1900, one hundred bales, and that it owes therefor the sum of $5,381.28, less $13.03, a credit to which it is entitled on account of freight paid by it, and it admits that the total of these items, to-wit, the sum of $7,285.46, is due on account of the purchase of said cotton, and it says that it is ready and willing to pay the same in full settlement for the said cotton under the contract made by its agent with the said Wells.

The defendant denies that it owes the plaintiff anything except the said balance of $7,285.46.

BURWELL, WALKER & CANSLER.

NORTH CAROLINA, }
Gaston County. }

John F. Love, being duly sworn, says that he is an officer of the defendant corporation, to-wit, its treasurer, and that the above answer is true of his own knowledge, except as to those matters therein stated on information and belief, and, as to those matters, he believes it to be true.

JOHN F. LOVE.

Sworn to and subscribed before me this the 30th day of January, 1902.

(NOTARIAL SEAL.) W. T. RANKIN,
Notary Public.

Endorsement:

Filed in this office February 1st, 1902.

H. C. COWLES, Clerk.

And the said cause being reached at the said June Term, 1902, of our said Circuit Court of the United States for said District at

10 Charlotte, N. C. Honorable Jas. E. Boyd, Judge of the Western District of North Carolina, being present, presiding and holding said Court, and coming on to be heard on June 18th, 1902, during said term, the following further proceedings are had therein, to-wit:

JURY.

No. 384 and 385.

W. L. Wells Company,
versus
Gastonia Cotton Manufacturing Company, and Avon Mills } Summons at law.

By consent; it is agreed and ordered that the causes be consolidated for trial. The case is called for trial. The issues are submitted and joined; and the hearing of the cause commenced.

It is thereupon ordered that a jury of good and lawful men come to try the issues joined between the parties.

Thereupon, the following jurors, to-wit: Geo. Sadler, Rich'd Lewis, Jno. A. Shuford, G. L. Rea, J. M. Runyans, E. A. Arledge, Henry Harwood, Frank Daniels, E. W. Thomas, W. R. Cox, A. L. Parker and W. H. Helms, are chosen, tried and sworn to speak the truth of and concerning the issues between the parties.

The jury retire while legal questions are being argued before the Court.

Issues and verdict as to Gastonia Cotton Manufacturing Co.

The jury return into Court, and separate issues being submitted to them, the jurors aforesaid, in open court, and under the instructions of the Court, return their verdict and say that they find the issues submitted to them as to the Gastonia Cotton Manufacturing Company in favor of the plaintiff, as follows, to-wit:

1. Is plaintiff a corporation as alleged in the complaint?

Answer: Yes.

2. Is plaintiff a citizen and resident of the State of Mississippi?

Answer: Yes.

3. What amount, if any, is plaintiff entitled to recover of defendant?

Answer: ($39,313.88) Thirty-nine thousand, three hundred and

11 thirteen dollars and eighty-eight cents, with interest on $35,397.99, from June 9th, 1902.

The defendant excepts. Exceptions allowed while the jury are still at the bar. Ordered that ninety (90) days be allowed defendant to file bill of exceptions.

JUDGMENT.

UNITED STATES OF AMERICA, WESTERN DISTRICT OF NORTH CAROLINA, IN CIRCUIT COURT AT CHARLOTTE, JUNE TERM, 1902.

No. 384.

W. L. Wells Company,
Plaintiff,
versus
Gastonia Cotton Manufacturing Company,
Defendant.

This cause coming on to be heard upon the pleadings and verdict of the jury, and the jury having found all the issues in favor of the plaintiff,

Now, therefore, upon motion of Murray F. Smith and Jones & Tillet, attorneys for the plaintiff, it is adjudged and decreed by the Court that the plaintiff, W. L. Wells Company, recover of the defendant, Gastonia Cotton Manufacturing Company, the sum of thirty-nine thousand three hundred and thirteen and 88-100 dollars, together with interest on the principal sum, to-wit, the sum of thirty-five thousand, three hundred and ninety-seven and 99-100 dollars until paid and the costs of the action to be taxed by the clerk of this court.

JAS. E. BOYD,
U. S. Judge.

Endorsement:

Filed in this office June 20th, 1902.

H. C. COWLES, Clerk.

12 **ORDER AS TO CONSOLIDATION AND SUPERSEDEAS BONDS TO BE GIVEN AND AS TO ONLY ONE WRIT OF ERROR TO BE SUED OUT.**

UNITED STATES OF AMERICA IN THE CIRCUIT COURT FOR THE FOURTH CIRCUIT, WESTERN DISTRICT OF NORTH CAROLINA.

No. 385.

W. L. Wells Company
Plaintiff,
versus
Avon Mills,
Defendant.

In this cause, it appearing that this action and another case of like kind, entitled W. L. Wells Company vs. Gastonia Cotton Manufacturing Company, to recover the price of cotton sold to the said defendants during the course of the same transaction, were, by consent of the parties and the order of the Court, consolidated merely for the purpose of more conveniently trying the same, a separate verdict and judgement having been rendered and entered in each case, and it now appearing that by consent of counsel for the Avon Mills and the Gastonia Cotton Manufacturing Company, it has been agreed that a writ of error shall be sued out in the case of Gastonia Cotton Manufacturing Company alone, and that the verdict, judgement and other proceedings in the said case against the Avon Mills, in the above entitled action shall abide the result in the case of W. L. Wells Company vs. the Gastonia Cotton Manufacturing Company in all respects, the same as if a writ of error had been sued out in each case, the two cases being alike in all essential features, and that whatever orders or judgments are entered in the case of W. L. Wells Company vs. Gastonia Cotton Manufacturing Company shall also be entered in the above entitled action against the Avon Mills, defendant: it being understood and agreed that the said Avon Mills shall give a supersedeas bond to be approved by the Judge in like manner as if it were intended to prosecute a writ of error, and, that the plaintiff shall have like right of action and other rights upon the said supersedeas bond, as it may have upon the supersedeas bond given in the said action against the Gastonia Cotton Manufacturing Company.

13 By consent of the parties the foregoing agreement is entered as a rule of Court in the above entitled action.

JAS. E. BOYD,
United States Judge.

By consent,

JONES & TILLETT,
Attorneys for W. L. Wells Company.
CHAS. PRICE,
BURWELL, WALKER & CANSLER,
Attorneys for Avon Mills.

The undersigned sureties upon the supersedeas bond of the Avon Mills in the above antitled action, hereby give their consent to the agreement of counsel above set forth and the order of the Court.

J. WHITE WARE,
JAS. A. PAGE,
JAS. A. PAGE,
J. WHITE WARE,
GEO. A. GRAY,
JNO. F. LOVE,
R. C. G. LOVE,
EDGAR LOVE.

Endorsement:

Filed in this office June 18th, 1902.

H. C. COWLES, Clerk.

ORDER OF THE COURT ALLOWING 90 DAYS TO PREPARE AND FILE BILL OF EXCEPTIONS.

The defendant, having tendered exceptions to the ruling of the Court, in the presence of and before the retirement of the jury, and having duly excepted to the judgement, it is ordered by consent of counsel, that defendant be allowed ninety days after the said 20th day of June, 1902, to prepare its bill of exceptions for the approval and signature and seal of the Court, and it is further ordered by consent of counsel that the penalty of the supersedeas bond be fixed at Forty-five Thousand Dollars.

And, afterwards, to-wit, on the 28th day of August, 1902, the defendant, the Gastonia Cotton Manufacturing Company, by its attorneys, Chas. Price, Esq., and Burwell, Walker & Cansler, filed in the

14 office of the Clerk of said Court, its Bills of Exceptions, which have been approved and signed by Hon. Jas. E. Boyd, who presided as Circuit Judge at the trial of said case, which Bill of Exceptions is in words and figures following:

Endorsement:

Filed in this Office June 20th, 1902.

H. C. COWLES, Clerk.

AGREEMENT OF COUNSEL.

UNITED STATES OF AMERICA, IN THE CIRCUIT COURT FOR THE FOURTH CIRCUIT, WESTERN DISTRICT OF NORTH CAROLINA.

W. L. Wells Company, Plaintiff, *versus* Gastonia Cotton Manufacturing Company, Defendant. } At Law.

This case, W. L. Wells Company vs. Gastonia Cotton Manufacturing Company, and another case of like kind entitled W. L. Wells Company vs. Avon Mills, to recover the price of cotton sold to it during the course of the same transaction, were, by consent of the parties and the order of the Court, consolidated, merely for the purpose of more conveniently trying the same, and a separate verdict and judgment was entered and rendered in each case.

It is now agreed that but one writ of error shall be taken out in the case of W. L. Wells Company vs. Gastonia Cotton Manufacturing Company, and that the judgment and verdict and other proceedings in the case of W. L. Wells Company vs. Avon Mills shall abide the result in the case of W. L. Wells Company vs. Gastonia Cotton Manufacturing Company in all respects, the same as if a writ of error had been sued out in each case, all of which will more fully appear by reference to the agreement of the parties, which has been entered as a rule of Court in the case entitled W. L. Wells Company, Plaintiffs, vs. Avon Mills, Defendant.

JONES & TILLETT,
Attorneys for W. L. Wells Company.
CHARLES PRICE,
BURWELL, WALKER & CANSLER,
Attys. for Gastonia Cotton Mfg. Co.

15 Endorsement:

Filed in this Office, Aug. 28th, 1902.

H. C. COWLES, Clerk.

BILL OF EXCEPTIONS.

UNITED STATES OF AMERICA, CIRCUIT COURT OF THE UNITED STATES FOR THE FOURTH CIRCUIT AND WESTERN DISTRICT OF NORTH CAROLINA, AT CHARLOTTE, JUNE TERM, 1902.

Gastonia Cotton Manufacturing Company, Plaintiff in Error,
versus
Wells Company, Defendants in Error. } At Law.

Be it remembered that, afterwards, on the 18th day of June, 1902, at the said term of the said Court, held in Charlotte, in and for the Western District of North Carolina, before His Honor, Jas. E. Boyd, Circuit Judge, the issues rasied by the pleadings in the above entitled cause between the said parties, as appears of record, came on to be tried before the said Judge and a jury, the plaintiffs in the Circuit Court, to-wit, the said Wells Company, being represented by Hamilton C. Jones and Chas. W. Tillett, and Murray Smith, as attorneys, and the defendant, the said Gastonia Cotton Manufacturing Company, by Chas. Price, and Armistead Burwell, Platt D. Walker and Edwin T. Cansler, of the firm of Burwell, Walker & Cansler, as attorneys:

The issues as settled by the Court were as follows:

1. Is plaintiff a corporation as alleged in complaint?
2. Is plaintiff a citizen or resident of the State of Mississippi?
3. What amount, if any, if plaintiff entitled to recover of defendant?

Before the introduction of any evidence, His Honor called upon the parties for a statement of their contentions, and thereupon the plaintiff's counsel stated that the plaintiff claimed the sum of thirty-five thousand, three hundred and ninety-seven and 99-100 ($35,397.99) dollars as due by the defendant for cotton sold, as set out in the complaint, together with interest at the rate of six per cent. 30 days after the date of the invoices. The defendant's counsel

16 stated that the defendant admitted that it had received from a firm or corporation called the W. L. Wells Company, the cotton, as set forth in the complaint, and that the charges for the same were correct, as stated in the complaint, but that defendant contended, first, that the plaintiff was not a corporation, and, second, that there had been paid on this claim, and the claim of the W. L. Wells Company against the Avon Mills, the sum of fifty thousand ($50,000) dollars, and the defendants admitted owing the balance to the firm or corporation known as the W. L. Wells Company.

EVIDENCE FOR PLAINTIFF.

The plaintiffs first offered in evidence the *origal* charter certified to under the Great Seal of the State of Mississippi, marked Exhibit 1) (p. 40).

Plaintiffs offered in evidence copy of a bill certified to under the Acts of Congress by the Chancery Clerk of Warren County in which Vicksburg is situated. Marked Exhibit 2 (p. 42 to 45).

J. T. WELLS INTRODUCED BY PLAINTIFF.

Q. Where do you live? A. Vicksburg, Miss.

Q. What is your present business? A. Cotton buyer.

Q. State whether or not you had any connection with the W. L. Wells Co., if so, what? A. I did, I was the Secretary and Treasurer of the W. L. Wells Co.

Q. Did you have any other connection? A. I was a stock holder and director.

Q. Please examine this book and state what it is. A. This book is a minute book of the W. L. Wells Co.

(The Minute Book of the W. L. Wells Company was offered in evidence by the plaintiff Marked Exhibit 3) (p. 45).

Q. Who was the president of the W. L. Wells Co.?

(Objection by defendant; objection overruled; exception.)

A. W. L. Wells.

Q. Who was vice-president? A. George Butterworth.

Q. Who was secretary and treasurer? A. I was.

Q. When did the W. L. Wells Co. begin doing business with the Avon and Gastonia Mills? A. Early part of the season of 1898, Sept. or Oct.

Q. When you use the word season please state to the jury what that means? A. The cotton season is from the first of Sept. until

17 the cotton is all sold in the spring; between Sept. of fall and April of spring.

Q. You commenced in the season of '98 when? A. Sept. 1st.

Q. When did it end? A. Aug. 31st, 1899.

Q. Where was the place of business of the W. L. Wells Co.? A. Vicksburg, Miss., Warren County.

Q. You did business with them of what character during the season of '98 and '99? A. We shipped them a considerable amount of cotton charged up on our books.

Q. What did they do? A. They remitted us from time to time.

Q. How did the season of '98 and '99 wind up; was the account finally closed? A. Yes, sir, it was.

Q. How was the cotton billed out? A. It was billed on the W. L. Wells Co. invoices.

Q. To whom were the remittances made? A. W. L. Wells Co.

Q. Whose books were they credited on? A. W. L. Wells Co. books.

Q. Did you do any business with them during the season of '99 and 1900. A. We did.

Q. How did that season wind up? A. They owed us a ledger balance.

Q. How were these invoices made out? A. On the regular invoices of the W. L. Wells Co.

Q. Were there any statements of accounts rendered from time to time? A. Yes, sir.

Q. In whose name were these written? A. W. L. Wells Co.

Q. How much is now due by the Gastonia Manufacturing Co. to the W. L. Wells Co? A. $35,397.99, exclusive of any interest.

Q. How much is due by the Avon Mills? A. $26,750.36 exclusive of interest.

Q. I notice that you have some books there; what are they? A. These are the account books kept by the W. L. Wells Co. The ledger and the cash book; they were kept by me.

Q. How were they kept? A. They were kept in due course of business.

Q. Did they show the state of accounts between W. L. Wells Co. and the Gastonia and Avon Companies. A. Yes, sir.

Q. Please give the pages of Gastonia Mill and Avon? A. Gastonia Manufacturing Co., pages 93, 94 and 95 in the ledger, The Avon Mills, pages 101 and 102. The other book is the cash book.

18 Q. Examine that and state what it is (counsel presented paper to witness.)? A. This is a statement of Avom Mills in account with W. L. Wells Co. from Oct. 23rd 1900 to Aug. 10th, 1901.

(This statement was offered in evidence by plaintiffs, Marked Exhibit 4 (p. 47).

(Like statement of Gastonia Manufacturing Company identified by witness and offered in evidence Marked Exhibit 5.)

—. Examine this paper? A. This is a statement of the Avon Mills in account with W. L. Wells Co., Oct. 17, 1899, to Aug. 18, 1900.

(This statement was offered in evidence by plaintiff, Marked Exhibit 6.)

(Like account with the Gastonia Mills offered in evidence and identified by witness, Marked Exhibit 7.)

Plaintiff's counsel then read in evidence letter of W. L. Wells Co., dated Feb. 7, 1900, to John F. Love, treasurer of the Mills Gastonia, N. C., enclosing a statement of account to Feb. 1st, 1900.

(The plaintiff here offered in evidence the statement of account mentioned in said letter) (p. 47).

Q. There was no objection made to that statement of account? A. No, sir.

(Plaintiff offered in evidence letter dated Feb. 9th, 1900, to Mr. Love from the W. L. Wells Co.) (p. 48).

(It is admitted that all the letters that W. L. Wells Co. wrote are written on this letter head.)

(Plaintiff offered in evidence telegram of March 6th, 1900, to Gastonia Manufacturing Co.) (p. 48).

(Plaintiff read in evidence telegram of John F. Love to W. L. Wells Co., of March 6th, 1900) (p. 49).

(Plaintiff read in evidence letter of W. L. Wells Co., of March 6th, 1900, to John F. Love, of Gastonia, N. C.) (p. 49).

19 (Plaintiff offered in evidence the statement there alluded to) (p. 50).

(Plaintiff read in evidence letter written April 2nd, 1900, to John F. Love) (50).

(Statement referred to in that letter offered in evidence) (51).

(Plaintiff read in evidence letter written May 7th, 1900, to John F. Love, Treasurer) (51).

(The statement referred to in that letter offered in evidence) (52).

Q. This statement of account I have just read in evidence, were there any objections made by the Gastonia or Avon Mills or by Mr. Love as Treasurer? A. No sir.

(Plaintiff read in evidence the original statement of July 1st, 1900) (53).

Q. Any objection made to that account? A. No sir.

(Plaintiff offered in evidence an account rendered Aug. 1st, 1900) (53).

Q. Any objection made to that statement. A. No, sir.

(Plaintiff read in evidence a statement rendered on Sept. 1st, 1900) (54).

Q. Any objection made to that statement? A. No, sir.

Q. As I understand you these defendants wound up the season of 1899 and 1900 with a balance due of how much? A. $12,691.67.

Q. That balance was due Sept. 1st, 1900? A. Yes, sir.

Q. That was the amount due by both companies. A. Yes, sir.

Q. How much of that $12,691.67 was due by Gastonia Manufacturing Co. A. $6,998.13; the amount due by the Gastonia Mills exclusive of interest was $5,901.38.

Q. How much was due by the Avon Mills? A. $4,098.62, exclusive of interest; the two amounted together to $10,000.00.

Q. I notice in this last statement of here rendered Sept. 1st, 1900, that you just make a statement of the balance due without stating separately which mill owes so much, etc.; what was your idea in doing that? A. We treated them as one in the accounts, they were

20 different in name only; we kept separate accounts on our books, but the payments all came through the same source and for that reason I consolidated them when I made interest on them and didn't keep the amount separately. However, that has been figured separately and has been charged to the respective accounts. That was only a matter of convenience for me.

Q. When Mr. Love would make you a remittance, how would that remittance be made, specifically for Avon and specifically for Gastonia Mills? A. Sometime it would and sometime it would not.

Q. Turn to your books and give an illustration of one of them given and how you disposed of it? A. For instance on June 5th, 1900, I received a check for $16,000.00; I credited $8,000.00 to Avon Mills and $8,000.00 to Gastonia Mills.

Q. How did you get that check? A. By mail.

Q. In these accounts which you have rendered I notice interest charged; upon what basis did you charge interest and what date. A. I calculated the interest from 30 days after the date the invoices were rendered; on these accounts while we were not shipping cotton, of course, they bore interest from the last date of rendering the statement.

Q. Did you get any objection to interest? A. No, sir.

(Plaintiff here offered in evidence statement of account rendered by W. L. Wells Co., the Gastonia Mfg. Co., showing balance due Aug. 15th, 1901; and a like statement showing the amount due by the Avon Mills, which was admitted to have been received by the defendant.)

Marked Exhibit 8 and 9 (p. 58).

Q. Please state if your books show any interest account or charges kept against John F. Love, Treasurer. A. Yes, sir, they do.

Q. What page is it on in your ledger? A. Page 291.

Q. How much interest does that show was due? A. $2,691.67 charged against John F. Love, Treasurer, up to Aug. 31st, 1900.

Q. From what date? A. Feb. 1st, 1900.

(Plaintiff introduced statement of account rendered Sept. 30, 1901) (p. 54).

Q. When was the capital stock subscribed by W. L. Wells, yourself and Mr. Butterworth paid in? A. Out of the profits of the first year's business.

Q. When? A. Early part of 1899.

21 CROSS EXAMINATION.

Q. Look at the books of the W. L. Wells Co. and tell me how much was due from the two mills on 31st of July, 1900, principal money. A. $19,206.30.

Q. I hand you a letter dated July 13th, 1900, look at that document and say whether it is copied in a letter book of the Wells Co.; if so, produce the letter book?

(Letter dated July 13th, 1900, of Wells to Love introduced in evidence by defendants and marked Exhibit A.; objection by plaintiffs; overruled; exception) (p. 58).

A. It appears to have been copied.

Q. In whose hand writing is it? A. W. L. Wells.

Q. In whose hand writing is the alteration made? A. I presume it is in his hand writing.

Q. Is that on a letter head of the W. L. Wells Co. A. Yes, sir.

Q. Came from the office of the company? A. Yes, sir.

(Letter read in evidence by defendant's counsel.)

Q. W. L. Wells was president of the Wells Co? A. Yes, sir.

Q. You were secretary and treasurer? A. Yes, sir.

Q. Mr. Butterworth was vice-president? A. Yes, sir.

Q. Mr. W. L. Wells is present in court today? A. Yes, sir.

Q. Look at this paper I hand you, pruported to be an invoice for 64 bales of cotton dated June 22nd, 1900, and say what it is. A. It is an invoice of 64 bales of cotton shipped to Gastonia, N. C.

(Invoice dated June 22nd, 1900, introduced in evidence and marked Exhibit B.) (p. 59).

Q. What was the price of cotton? A. 10 1-4 cents.

Q. How much did it amount to? A. $3,283.18.

Q. What figures and words are on that paper in the hand writing of Mr. Love? A. Account, $5,923.12; total, $9,206.30.

Q. I hand you a check dated Aug. 1st, 1900, drawn by John F. Love cashier on the Hanover National Bank of New York; look at this check and say when you received it, if you did receive it? A. I have it credited Aug. 3, 1900; I presume I received it that day (p. 59).

Q. Had you received that check when you marked that invoice paid? A. Yes, sir.

22 (Check dated Aug. 1, 1900, offered in evidence by the defendants, and marked Deft.'s Exhibit C.) (p. 59).

Q. Was the business of W. L. Wells Co. for the season of '98 and '99 fully settled; was the account between the defendants and the Wells Co. for the season '98 and '99 fully settled? A. Yes, sir, it was.

Q. You said in your direct examination that you sent to the defendant or J. F. Love, treasurer, the statement of the account dated Aug. 1st, 1900? A. I don't know whether I did or not.

Q. I hand you your statement purporting to have been made to the defendant company, dated Aug. 1st, 1900; was that statement sent? A. Yes, sir.

Q. Had you at the time you made that statement received $9,206.30? A. I had not.

Q. Did you make credit on your statement of Sept. 1st? Look at this paper purporting to be a statement of your company dated Sept. 1st, 1900, and say whether it was sent to the defendant company. A. It was.

Q. Did you say on your direct examination this morning that no objection was made to that statement? A. I did.

Q. Refresh your memory; do you still say that no objection was made to that statement? A. I don't recall any.

Q. Will you please produce a certain letter which you wrote to J. F. Love accompanying that statement and which was returned by him to your company? A. I recall this letter.

(Letter dated Sept. 1, 1900, offered in evidence by defendants and marked Deft.'s exhibit D.) (p. 59).

Q. Who wrote the letter. A. I did.

Q. In whose hand writing is the endorsement at the bottom of that page? A. It appears to be Mr. Love's.

Q. Received by you in the office at Vicksburg? A. Yes, sir.

Q. At the close of the season of "99 and 1900 these two mills owed your company $10,000.00 principle money, besides interest? A. Yes, sir.

Q. When did your company first demand that money and how was the demand made? A. I don't recall the date. We were writing them for money I should say in Dec. and January following.

Q. I will ask you if you can find among your records of the Wells Co. any demand made for this balance due on the season of '99 and 1900; if so, show it? A. That balance is included in our statements.

23 Q. Can you show on the records of the company any demand made for the balance due according to your statements of your company from these two defendants for the season of '99 and 1900? If so, please produce it, letter or telegram. A. I cannot for that identical amount.

Q. What do you mean by identical amount. A. I mean that particular amount.

Q. What was the first shipment made to the defendants or either of them in the fall of 1900 and after the close of the season of 1900 and 1901? A. Oct. 2, 1900.

Q. To which mill was that sent? A. Gastonia Manufacturing Co.

Q. How much was that invoice? A. $2,814.13.

Q. Has that been paid? A. Yes, sir.

—. Was that invoice receipted by you and returned to the company? A. I presume so; yes, sir.

Q. I hand you invoice for 50 bales of cotton, $2,814.13; has that invoice been paid, and when was it paid? A. This was marked paid by me on Oct. 11, 1900.

(Invoice dated Oct. 11, 1900, introduced in evidence by defendants and marked Deft.'s Exhibit E.) (p. 60.)

Q. The next invoice was Oct. 11, 1900 for $2,764.19? A. Yes, sir, this was receipted by me Oct. 29th, 1900.

(Exhibit F offered in evidence by defendants) (p. 60).

Q. The next invoice is dated Oct. 20th, 1900, for $2,660.67; look at that paper and tell when that invoice was paid? A. Marked paid Oct. 29th, 1900.

(Invoice dated Oct. 20th, 1900, offered in evidence by deft. and marked Defts.' Exhibit G.)

Q. The next invoice is Oct. 21st, for $3,283.48, paid December 3rd, 1900?

(Invoice dated Oct. 21st, introduced in evidence by deft. and marked Exhibit H.)

Q. The next invoice is dated Oct. 25th, for $5,263.89; is that invoice marked paid? A. Yes, sir; Dec. 3rd, 1900.

(Invoice dated Oct. 25th, offered in evidence by deft. and marked Exhibit J.) (p. 61).

24 Q. What is the next invoice? A. Dated Oct. 29th, for $2,640.60; paid Dec. 3rd, 1900.

(Invoice dated Oct. 29th, offered in evidence by defts. and marked Defts. Exhibit K.)

Q. What is the next invoice? A. Nov. 2nd, for $2,764.52; marked paid Dec. 3rd.

(Invoice dated Nov. 2nd and offered in evidence by defts. and marked Exhibit L.)

Q. What is the next invoice? A. The same date for $6,492.42.
Q. Was that invoice paid? A. Yes, sir; marked paid Dec. 3rd.

(This invoice was offered in evidence by defts. and marked Exhibit M.)

Q. What was the next invoice? A. Nov. 5th, for Gastonia Mills, for $5,153.92.
Q. When was that invoice paid? A. Marked paid Dec. 3rd.

(Exhibit N offered in evidence by defts.)

Q. What was the next invoice? A. Nov. 15th, Gastonia Mills, for $2,637.84.
Q. Have you on your books an invoice for Oct. 30th, 1900, for $3,281.87? A. There is one Oct. 31st for that amount.

(Invoice dated Oct. 31st, 1900, offered in evidence and marked Defts.' Exhibit O.)

Q. I hand you this invoice and ask you if it was paid? A. Yes, sir; Dec. 3rd, 1900.
Q. Look at your book and see if you have an account of the invoice of Oct. 30th, 1900, for $11,428.89? A. Yes, sir; marked paid Dec. 3rd.

(Invoice dated Oct. 30th offered in evidence by defendants and marked Exhibit P.)

Q. Look at Exhibit J. and see if the invoices we have mentioned amounts to $40,357.59? A. Yes, sir; that is right.
Q. Look at Exhibit J. and see what figures and words on that exhibit are in the hand writing of J. F. Love? A. Total, $40,357.59; less check, $25,000.00; enclosing $15,357.59 (p. 61).

25 Q. When John F. Love, treasurer, returned you that invoice with those words and figures written on it by himself, what did he send you with it? A. A New York exchange for $15,357.59.

Q. Is the check I hand you the check enclosed? A. Yes, sir.

(Exhibit Q. offered in evidence by defts.) (p. 61).

Q. Is the check I now hand you the check for $25,000.00 spoken of in Mr. Love's statement and that invoice? A. Yes, sir.

(Marked Defts.' Exhibit R.) (p. 61).

Q. Did that check enclosed with that voucher pay all the invoices that were then due, and some that were not due? A. It paid all the invoices of the Gastonia Manufacturing Co. up to and including Nov. 5th, 1900; all of the Avon Mill up to and including Nov. 2nd.

Q. That is, if I understand you, it covered all the invoices that were due 30 days after the dates you have given? A. Yes, sir.

Q. And the check enclosed with that invoice was received by you Dec. 3rd, 1900, in Vicksburg? A. Yes, sir.

Q. Look at this letter and state in whose hand-writing it is, and on what letter head it is written. A. This is W. L. Wells' hand-writing, and it is written on the company's letter head.

(Letter of Oct. 4th, 1900, in the hand-writing of W. L. Wells, signed by him, and on letter head of W. L. Wells Co., offered in evidence by defendants; objected to by plaintiffs; objection overruled exception.) Marked Exhibit S. (p. 62).

Q. In whose hand-writing is this letter? A. I should say it was in J. F. Love's. It is written on the letter head of the Gastonia Mills and Avon Mill and is addressed to W. L. Wells.

(Letter of Feb. 4th, 1901, hand-writing of J. F. Love, on letter head of Gastonia Manufacturing Co. and Avon Mill, and Loray Mills, addressed to W. L. Wells, Vicksburg, Miss., offered by defts.; objection by plaintiffs; objection overruled; exception.) Marked Deft.' Exhibit T. (p. 62).

Q. Who were the stockholders of the W. L. Wells Co. A. W. L. Wells, myself and George Butterworth.

Q. How much stock did W. L. Wells take? A. Ten shares. I took five shares and Mr. Butterworth five.

Q. Have you a book of subscription to stock? A. No, sir.

Q. Any account? A. No, sir.

26 Q. Did you ever issue any stock? A. No, sir.
Q. Ever have a seal? A. Yes, sir.
Q. Where is the seal? A. At Vicksburg.
Q. Where is the minute of adopting the seal? A. Didn't adopt it.
Q. How many meetings did you have? A. Several.
Q. Where? A. At Vicksburg.
Q. Who was present? A. W. L. Wells and I, and other times W. L. Wells and myself and Mr. Butterworth.
Q. Where are the proceedings of these meetings? A. We didn't keep them, no record of them.
Q. How many shares did you subscribe for? A. Five shares, amounting to $2,500.00.
Q. Did you pay for them? A. Yes, sir; out of my profits of the first year.
Q. Where is it charged on the books? A. It is not charged on the books.
Q. Any check? A. No, sir.
Q. How was it paid? A. My part of the profits of the concern.
Q. If it is not charged it has never been paid? A. Yes, sir, it has.
Q. It was paid from the profits of the first year? Is that the best answer you can make; how much did you pay? A. I appropriated that much, $2,500.
Q. Show the entry on the book? A. There is no entry, it is the profits of the concern.
Q. Where is the evidence that you paid it? A. I have offered as full explanation as I can.
Q. Where is the evidence of the profits? A. On the books.
Q. Show them on the books? A. It would take some time to get a trial balance of the books. If you want it I can produce it in court in the morning.
Q. When did you pay for the stock? A. Out of the profits of the first year.
Q. If you didn't do that you have never paid for it? A. No, sir.
Q. When did Mr. Butterworth pay for it? A. In the same way I did.
Q. How did Mr. W. L. Wells? A. In the same manner.
Q. Where is it charged to him? A. It is not charged to him.
Q. No stock ledger or certificate? A. No, sir.
Q. No record of any meeting except what has been produced; in evidence? A. That is all.
Q. Who were present at these meetings? A. W. L. Wells and myself.

27 Q. Any dividends declared? A. No, sir.

Q. You a member of that company now? A. Yes, sir.

Q. How much stock? A. $2,500.00.

Q. Is Mr. Butterworth a member? A. Yes, sir.

Q. Any other connection with the company? A. He is a director and officer, vice-president.

Q. Is he engaged in any other business now? A. Yes, sir; cotton buying business. Under the name of G. Butterworth and Co.

Q. Does he stay in the office of the company? A. No, sir.

Q. What is your business? A. Cotton buyer.

Q. Under what name? A. Luckett and Wells.

Q. What are you in connection with the W. L. Wells Co.? A. Sec. and treasurer.

Q. That is Wells Co. is doing business under the name of Luckett & Wells? A. No, sir; W. L. Wells Co. is not in active business now.

Q. Who is W. L. Wells & Co.? A. W. L. Wells, I presume.

Q. Who was it in 1899? A. W. L. Wells, T. J. Wells and Mr. Butterworth, under the name of W. L. Wells Co.

Q. Who carries on the business of W. L. Wells Co. now? A. We haven't had a meeting recently.

Q. Who is W. L. Wells & Co.? A. W. L. Wells is the only member of the Company I know.

Q. I understood you to say yesterday that W. L. Wells conducted what business prior to the supposed organization of W. L. Wells Co. the company of W. L. Wells Company, and didn't I also understand you to say after the W. L. Wells Co. ceased to operate the cotton business W. L. Wells succeeded to the business under the name of W. L. Wells & Co., and is conducting that business now? A. Yes, sir; he is conducting now a cotton business under the name of W. L. Wells & Co.

Q. Did he succeed W. L. Wells Co.? A. I don't know.

Q. He organized a different business? A. He began business under the name of W. L. Wells & Co. It was the same nature of business.

Q. Used same stationery? A. I presume he does; I don't know.

Q. Same clientage? A Partly, I think.

Q. What connection did you have with the W. L. Wells & Co. firm that preceded the so-called W. L. Wells Co. Corporation? A. None at all.

Q. What connection have you with the present firm of W. L. Wells & Co.? A. None whatever.

Q. What connection did Mr. Butterworth have with the old firm

28 of W. L. Wells & Co.? A. He was an employee of the company previous to the incorporation of the W. L. Wells Co.

Q. At what point did he reside? A. Yazoo City, Miss.

Q. Where did he reside while the business was conducted under the name of W. L. Wells Co.? A. Same place.

Q. Who resided in Vicksburg of the stockholders of the W. L. Wells Co.? A. W. L. Wells and I.

Q. Did that Company have any by-laws? A. No, sir.

Q. Did Mr. Butterworth ever attend a meeting of the stock holders or directors of that company? A. He did.

Q. When? A. From time to time. I don't recall the dates.

Q. Can't you recall one date? A. No, sir.

Q. Can you tell where that meeting was held? A. In the office of W. L. Wells Co., Vicksburg.

Q. Whose office is that now? A. W. L. Wells & Co.

Q. Who has possession of the W. L. Wells Co. books? A. In the safe of the W. L. Wells Co.

Q. Is that safe used by the W. L. Wells & Co.? A. Yes, sir.

Q. What became of the assets of the W. L. Wells Co.? A. Principally in debts.

Q. Who has these debts? A. The company has them.

Q. Where are the evidences of them? A. On the books here.

Q. In whose possession are they in Vicksburg? A. In the safe of W. L. Wells Co.

Q. Who has charge of the collection of these assets? A. The company.

Q. Through whom? A. Either one of the officers or directors.

Q. Have you any charge of that business? A. Yes, sir.

Q. What charge? A. I collect and receipt for any debts due the concern.

Q. I will ask you as a matter of fact what have you been in connection with the assets of the W. L. Wells *C.* since that corporation ceased to do business, and W. L. Wells & Co. assumed the management of it? A. They have not assumed management of it; I have no connection with W. L. Wells & Co.

(Plaintiff here objected to all of this testimony; objection overruled; testimony admitted; exceptions.)

Q. I understood you to say yesterday that you had put nothing in the W. L. Wells Co.? A. I haven't paid cash in there.

29 Q. How much have you taken out of W. L. Wells Co., according to your books? A. $10,217.55.

Q. How long did the company operate? A. Three years.

Q. How much did Mr. Butterworth put into the company? A. He didn't put in any cash.

Q. Did you or he put into it any property? A. No, sir.

Q. Who did furnish all the capital of the W. L. Wells Co.? A. There was absolutely no capital to start with.

Q. Whose credit maintained the business of the W. L. Wells Co.? A. The credit of the stockholders.

Q. Your own for instance? A. Yes, sir.

Q. What was your financial condition in the years during which this company operated? A. My financial ability was rather limited.

Q. How much were you worth over and above exemptions allowed by the State of Miss.? A. I don't suppose I was worth anything.

—. Do you know the financial standing of Mr. Butterworth during those years? A. No, sir.

Q. Do you know the financial standing of your brother during those years? A. Yes, sir; to an extent. He was a man of considerable means.

Q. How much was he estimated to be worth? A I don't know.

Q. I will ask you if he was not reputed to be worth from 150 to 300 thousand dollars? A. I presume he was.

Q. You don't know the general reputation of Mr. Butterworth's financial standing? A. I know in a general way; he was a man of limited circumstances.

Q. How limited? A. I don't know.

Q. Don't you think from his general reputation he was worth nothing over and above his exemptions in property? A. I don't know, but I think not.

Q. How much, according to the books, did Mr. Butterworth draw out from the Wells Co.? A. $9,022.65.

Q. What was your salary as secretary and treasurer? A. We drew no salaries.

Q. What was your compensation to be? A. One-fourth of the net profits.

Q. What was the salary of the vice-president? A. Nothing.

Q. What was his compensation to be? A. One-fourth of the profits.

Q. What was the compensation of the president? A. Nothing.

Q. What was he to receive? A. He was to receive his proportion of the profits.

30 Q. Was he allowed interest on the capital which he furnished the company? A. No, sir; he didn't furnish any capital; he loaned them some money.

Q. Did he furnish any credit? A. Yes, sir; he furnished most of it.

Q. Won't you say he did all of it? A. No, sir.

Q. Who did, if you and Mr. Butterworth were insolvent? A. We had a reputation of being honest.

Q. I will ask you if Mr. W. L. Wells was not the head of the concern and all of the W. L. Wells Co.? A. No, sir; he was not.

Q. In what particular was he not? A. He didn't have the entire management of it and he didn't furnish everything.

Q. What didn't he have controll of? A. He didn't have the entire controll of anything.

Q. What did he not have controll of? A. The making of contracts, the selling of cotton and everything else.

Q. Didn't he generally make the contracts? A. He did some time.

Q. Did you travel at all for the company? A. No, sir.

Q. Did Butterworth ever travel for the company? A. He did in the country to buy cotton.

Q. Who transacted all the business of the Wells Co. in North Carolina? A. W. L. Wells.

Q. You had nothing to do with it? A. No, sir.

Q. Nor Butterworth? A. No, sir.

Q. Your business was simply to receive the money and pay it out as W. L. Wells directed it? A. No, sir.

Q. Under whose direction did you pay it out? A. Under the direction of a consultation between us. We advised as to the policy of the business.

Q. You and who? A. W. L. Wells and I.

Q. Did you advise about the policy of the business in North Carolina? A. Yes, sir.

Q. When? A. From time to time.

Q. In the meeting of the directors? A. Yes, sir; we might call a meeting of the directors; W. L. Wells and I. We were the directors and officers and conducted the business.

Q. You kept up with the business of the company? A. Yes, sir.

Q. Did you ever refuse to ratify any act that W. L. Wells did for the company? A. No, sir.

Q. Did you ever object to any act that W. L. Wells did for the company? A. Yes, sir.

Q. Can you recall one act? A. No, sir.

Q. I understood you to say yesterday that when the check for $9,603.30 was received by you on Aug. 3rd, 1900, you returned the

31 same to Mr. Love, that is the invoice with which the check was enclosed? A. I returned to him an invoice of $3,283.18.

Q. His letter or his invoice enclosing that check passed between Gastonia and Vicksburg, your statement of Aug. 1st? A. I don't know.

Q. You mailed your statement 1st day of Aug.? A. Yes, sir; that is my recollection.

Q. The check enclosed was dated July 31st, Gastonia? A. That is my recollection.

Q. You received it Aug. 3rd? A. Yes, sir.

Q. I will ask you that according to the usual course of the mails, if a letter mailed in Gastonia 31st of July would not pass or cross or meet a letter coming from Vicksburg dated Aug. 1st? A. Yes, sir.

Q. Hence when Mr. Love received your statement, dated Aug. 1st, he received a statement that was sent from your company before you received the $9,630.00 check? A. Yes, sir.

Q. Then the receipt of that check would not be on that statement? A. No, sir.

Q. Then the statement of Sept. 1st, sent by you, contained a statement that you received $9,000.00? A. Yes, sir.

Q. And it showed a balance of $10,000.00 principal; $2,691.67 interest? A. Yes, sir.

Q. According to the books of your company that statement was intended to show that Gastonia Mills, represented by J. F. Love, treasurer, owed to the Wells Co. $10,000.00, principal money, and $2,691.67 interest? A. Yes, sir; the Gastonia and Avon Mills.

Q. You received no reply to that statement, the letter which you had written Mr. Love on the lower part of which he had written a statement crediting to the Loray Mills $10,000.00 stock Lorey. That was received by you as treasurer of the company? A. It was received.

Q. You were the only stockholder in the company in the office? A. Yes, sir.

Q. Where was Mr. W. L. Wells at that time? A. He was expected in Gastonia the day I received that.

Q. What notice representing the company did you ever make of that memorandum? A. Absolutely none.

Q. You filed it among the records of the company? A. I put it aside with the letters to be filed, and it was filed by the young man in the office.

Q. I understand you to say that your company or you for your company, never did send to either one of these mills, the Avon or Gastonia, or to J. F. Love, treasurer, any statement showing that these companies owed that $10,000.00 until the summer of 1901? A. I don't think I stated that.

32 Q. Will you say now whether you did or not? A. We were continually after them for money along say in Nov. and Dec., 1899.

Q. All the letters of the company are here? A. Yes, sir.

Q. I will ask you to produce any letter or statement sent by you, or by any member of the company, or any of its agents or servants or clerks between Sept., 1900, and Aug., 1901, showing an assertion on the part of your company that $10,000.00 was due; please produce all such letters and all such statements? A. In answer to this question, I produce the following letters: Letter dated Nov. 21st, 1900, copied in letter book No. 4, page 149 (p. 133).

Q. Who signed that? A. W. L. Wells, individually.

Q. What is the next *letter?* A. Jan. 2nd, 1901, book 4, page 288 (p. 137). The next letter is Aug. 12. 1901, book 4, page 653 (p. 57).

Q. Can you produce any other? A. That is all I can discover, looking through them hurriedly.

Q. Have you any reason to believe that there are any others that you haven't produced? A. I don't think there are; I don't know.

Q. On Nov. 19th, 1900, Mr. Love made you a general remittance of $25,000.00? A. Yes, sir.

Q. I will ask you on what invoice you applied that $25,000.00? A. No specific invoice.

Q. I will ask you if that $25,000.00, added to $15,357.59, the check of Dec. 1st, 1900, received by you Dec. 3, 1900, did not pay all the invoices of the full purchase, and haven't you on this examination admitted the payment of these by that fund? A. They paid all the invoices from Oct. 2nd, to Nov. 5th, inclusive, for Gastonia Cotton Mfg. Co., and Oct. 23rd to Nov. 2nd, inclusive, for Avon Mills.

Q. Then I understand you, Mr. Love, in the fall of 1900, made you a general remittance of $25,000.00 without instructions as to its application? A. Yes, sir; I applied it to his account.

Q. Isn't that a part of the $40,357.59 for which, on yesterday, I produced a voucher signed by you? A. Yes, sir.

Q. Refresh your memory and say what the $25,000.00 was applied to? A. $10,000.00 for Gastonia Manufacturing Co. and $15,000.00 for Avon Mill.

Q. Didn't you receipt this voucher? A. Yes, sir.

Q. How were they paid? A. By $25,000.00 check.

Q. Then no part of this general remittance was applied on the general balance of 1899 and 1900? A. Until we got these invoices and then they were marked paid.

Q. It was placed to the credit of Avon and Gastonia Mills and when Mr. Love sent the $40,357.59 invoices you marked the invoices

33 paid, because you had received the $25,000.00 check and returned them to Mr. Love? A. Yes, sir.

Q. How long have you kept books? What experience have you had in keeping books? A. Since 1884.

Q. I ask you now that according to the papers that have been exhibited to you what invoices did you apply the $25,000.00? A. All the invoices that are enumerated.

Q. I understood you to say yesterday that the $15,000.00 check settled all the invoices that were due on Dec. 31st, 1900? A. I stated that they settled all the invoices from Oct. 23rd, 1900, to Nov. 2nd, 1900, inclusive, of the Avon Mills, and from Oct. 2nd, 1900, to Nov. 5th, 1900, inclusive, for Gastonia Manufacturing Co.

Q. How much did the two mills owe your company according to your books, on Jan., 1900? A. The Gastonia Manufacturing Co. owed $35,397.99, and the Avon Mill owed $26,750.36.

Q. When was payment of that sum demanded by your company? A. I don't know, the letters will show.

Q. Can you produce the letters demanding payment? A. Here is a letter Jan. —st, 1901. This letter was signed by W. L. Wells Co. (p. 138).

(All the letters that we rely on as constituting a demand have been introduced in evidence.)

RE-DIRECT EXAMINATION.

Q. In what business were you engaged prior to the time you went in with the W. L. Wells Co.? A. I was book-keeper for the Delta Trust & Banking Co.

Q. Did you continue in their employment afterwards? A. No, sir.

Q. What business did you follow after you went in with the W. L. Wells Co.? A. I was book-keeper and office man.

Q. What other means did you have of making your livelihood? A. None.

Q. Where were your headquarters? A. W. L. Wells Co. office.

Q. What had Mr. Butterworth been doing prior to that time? A. Buying cotton.

Q. For whom? A. W. L. Wells & Co.

Q. After W. L. Wells Co. was formed what did he do? A. Bought cotton for the W. L. Wells Co.

Q. In whose name was the bank account of the W. L. Wells Co.? A. W. L. Wells Co.

Q. I believe I understood you to say that W. L. Wells paid

34 no money into the W. L. Wells Co. at the beginning? A. I did.

Q. You say Mr. W. L. Wells loaned the company $10,000.00? A. Yes, sir; he did.

Q. When was that loan made? A. Nov. 14th, 1898.

Q. When was it paid off? A. June 24th, 1899.

Q. How much did the W. L. Wells Co. make the first year? A. About $37,000.00 net profits.

Q. How much did you draw out the first year? A. $1,813.23.

Q. How much would your share of the net profits have been? A. Roughly stated, $9,250.00.

Q. How much did Mr. Butterworth draw out? A. $2,343.44.

Q. What salary were you getting when you went into the W. L. Wells Co.? A. I was making $1,800.00 a year.

Q. What salary was Mr. Butterworth getting when he went into that company? A. I don't know.

Q. How much did the W. L. Wells Co. make the second year? A. Something like 24 or 25 thousand dollars, that is my recollection.

Q. How much did you draw out the second year? A. $3,008.91.

Q. How much did Mr. Butterworth draw out? $3,741.55. -hese figures are subject to correction.

Q. How much did W. L. Wells draw out the first year? A. $238.81.

Q. How much the second? A. 12,136.81.

Q. How much did he draw out in all, including the $10,000.00? A. $11,082.24.

Q. Do you know whether or not W. L. Wells had a private bank account? A. Yes, sir; he did.

Q. About this remittance of $25,000.00 and $15,000.00, when you first got that $25,000.00, did you get any invoices? A. No, sir.

Q. Did you get any directions from Mr. Love how to apply it? A. No, sir.

Q. When did you get specific invoices? A. Dec. 3rd.

Q. When he remitted you that $15,000.00? A. Yes, sir.

Q. Then it was you receipted these invoices and sent them back to him? A. Yes, sir; that is correct.

Q. About this letter of Aug. 31st, upon which is this, "we wish to see your Mr. W. L. Wells about it when he comes to see us, etc." About what time did you receive that letter? A. About Sept. 5th.

Q. Where was Mr. W. L. Wells at that time? A. He was in New York, if I remember correctly.

35 Q. When did you first see him after that? A. Latter part of Sept., I think.

Q. What had become of this letter with this endorsement in the meantime? A. It had been filed away.

Q. Do you recollect whether or not you ever had any conversation with Mr. W. L. Wells about this endorsement after that date? A. No, sir; never.

Q. Did you know what the endorsement meant? A. No, sir.

Q. Did you ever hear of any subscription to stock of the Lorey Mills? A. No, sir.

Q. How does that balance stand on your books for the close of the season for 1899 and 1900, with the Avon and Gastonia Mills; is it closed or not? A. It is not closed. It is still open, both of them.

Q. When you commenced business in 1900 and 1901, what sort of account did you open; a new one or not? A. I left the accounts just as they appear and opened a new account on the following page of my ledger.

Q. Please explain why you adopted that method? A. My idea in doing so was to keep each year's business separate.

Q. There was a letter introduced here yesterday of Oct. 4th, 1900; state if you knew anything about that letter? A. No, sir; I knew nothing about this letter. (Witness read letter) (p. 62).

Q. Do you know anything about that subscription in there? A. Nothing whatever.

Q. There was a letter introduced of Feb. 2nd, 1901; did you know of that letter or the reception of it? A. No, sir (p. 62).

Q. I understood you to say that you did not receive that letter at that time? A. No, sir; I did not receive it.

Q. When did you first learn of the receipt of that letter? A. I don't recall. I think it was after the suit was brought.

Q. How did these letters come, addressed to the firm or to Mr. W. L. Wells? A. They were addressed to W. L. Wells and marked personal.

Q. Did you open any of these letters marked personal? A. No, sir.

Q. Did you know of their contents at all? A. No, sir.

Q. Where was Mr. Butterworth at that time? A. In Yazoo City, Miss.

Q. It seems that you did not, after Jan. 31st, 1901, and up to some time in August, make any demand about the amount due by the Gastonia and Avon Mills? Will you please state whether or not during that time this matter of amount was discussed by the company there in Vicksburg? A. Yes, sir; it was several times.

36 Q. Was there anything said about $50,000.00 having been paid on these subscriptions out of the fund of the company in these conversations? A. No, sir.

Q. Why was the reason of this delay? A. When I mentioned it to W. L. Wells he would say, never mind, don't worry, they are hard up, or something of that kind. Then we were selling them cotton for cash along in the spring of the year. They had owed us more than that at one time.

Q. When? A. I don't recall; for instance in Dec., '99, they owed us more than that; they owed us on the 31st of Dec., 1899, including Ozark, $108,902.06.

Q. How long were they paying that? A. The first remittance after that time was Jan. 13th.

Q. How much? A. $8,086.24 for Gastonia Mill, and $9,748.76 for Avon Mill.

Q. How much did Avon and Gastonia Mills owe on Jan. 31st, 1900? A. $95,269.02.

Q. In that season, after they commenced owing you so much, was there any change made in reference to the shipments from that time on? A. There was no change made that season.

Q. Ar-n't you mistaken about that? A. If there was I don't recall it.

Q. I call your attention to the letter of the 12th Feb.; refresh your memory (p. 121).

Letter was read by council.

A. My books would not have that if they were drawn on 30 days or 60 days time; they would appear on the cash book.

Q. Look at your invoice book, Feb. 16th, 1900. A. That would be handled as cash entirely, and not on my ledger. We did sell them on sight drafts after that time.

Q. Again I call your attention to the letter of Jan., 1900. A. We were selling them for cash then.

Q. In the season of 1900 and 1901, after they commenced to owe you so much money, what procedure did you adopt in reference to payments for cotton? A. The same plan.

Q. In the season of 1900, after they had accumulated this indebtedness of $95,000.00 to the firm, you sold them sight drafts and they made you remittances from time to time on old accounts on that $95,000.00? A. Yes, sir.

Q. The season ending 1901 you said Mr. W. L. Wells would say they were hard up and just let the matter stand? A. Yes, sir; that is correct.

Q. He would advise against pushing the account? A. Yes, sir.

37 Q. Your capital was $10,000.00; how did you buy this large amount of cotton and carry it? A. We carried it on credit.

Q. Where did you get the money from? A. Merchants' National Bank.

Q. How much did you all owe the bank? A. We some time owed them the first year as high as $60,000.00 and more; the year '98 and '99. During the year '99 and 1900 something over $166,000.00.

Q. When was this? A. Jan. 4th, 1900.

Q. How much did you owe the bank during the season of 1900 and 1901? A. The largest amount I should say was $128,000.00.

Q. Does the W. L. *Wels* Co. owe the bank anything now? A. Yes, sir.

Q. How much? A. $27,100.19, not including interest. The interest has not been charged since Oct. 31st, 1900, on our books.

Q. Does the W. L. Wells Co. owe any other debts besides that? A. Practically none.

Q. Who do the assets of that company belong to? A. Stockholders.

Q. In what proportion? A. In the proportion of which they hold stock.

Q. Is it that way now? A. There has never been any division.

Q. Has any formal or informal transfer of your stock or interest ever been made to any one? A. No, sir.

Q. Has any formal or informal transfer of Mr. Butterworth's stock ever been made? A. Not that I know of.

Q. You own yours and are claiming it to-day? A. Yes, sir.

Q. Something was asked you about your financial condition; how long have you lived in Vicksburg? A. Since 1886, 16 years.

Q. What business have you been engaged in up to this time? A. I was book-keeper for Willis Moore & Co., cotton factors.

Q. Is there any larger concern than they in Vicksburg? A. No, sir.

Q. Then where did you go to? A. Delta Trust & Banking Co.

Q. What kind of institution is that? A. Large banking institution.

Q. How long did you stay with them? A. Five years at the time I went with this business.

38 Q. Ever have any difficulty in getting what money you wanted? A. No, sir.

Q. When did you draw the last cent out of this business? A. Sept. 7th, 1901, I drew $100.

Q. What business have you been following since September 7th, 1901? A. Buying cotton.

Q. Under what name? A. Luckett & Wells.

Q. What kind of business have you all been doing? A. We have done a satisfactory business; not large and not small.

Q. Had Mr. Luckett purchased cotton for himself prior to that time, on his own account? A. Yes, sir; he had.

Q. You had not? A. No, sir.

Q. What did Mr. W. L. Wells do? A. He bought cotton.

Q. When contracts for purchase were made who would buy that cotton? A. W. L. Wells.

Q. Under whose name? A. W. L. Wells Co.

Q. Did you have any cognizance of these telegrams from time to time? A. Yes, sir.

Q. In the discussions you and Mr. Wells had, did you discuss the policy of the business? A. Yes, sir; we did quite often.

Q. Something was said about the traveling of the firm; what do you mean by the traveling of the firm? A. Cotton buyers usually make their trips in the summer time to see their correspondents in the east and elsewhere, and this was done by Mr. Wells.

Q. When Mr. Wells came back at the end of the summer was anything said about the contracts made? A. Yes, sir.

Q. Who paid the expenses of Mr. Wells? A. The company.

Q. Do you recall any trip or trips that Mr. Butterworth made for the company? A. He went to England; he was raised in England and went over there to make arrangements for the firm in Manchester to buy cotton for those mills.

Q. Did you do any business with them? A. Yes, sir; some.

Q. Did you fill any of these contracts? A. Yes, sir.

Q. That Mr. Butterworth made? A. Yes, sir.

Q. On Dec. 3rd, 1900, when these invoices were receipted upon the receipt of that $15,000.00, were there any other invoices due at that time. A. Other invoices had been made, but they hadn't reached maturity.

Q. Have you stated the amount of the other invoices? A. No, sir.

Q. How much was it? A. I made a memorandum of it.

Q. Give me the dates of those invoices? A. At Gastonia Mills, Nov. 15, $26,378.84; Nov. 21st, $2,190.82; Nov. 24th, $5,276.24;

39 Nov. 26th, $4,862.35; Nov. 26th, $4,954.48. Avon Mills: Nov. 24th, $6,515.36; Nov. 28th, $5,598.14; Nov. 28th, $5,675.35.

Q. What is that $22.50 to come off of that? A. That is the freight from Clover, S. C., to Gastonia on fifty bales of cotton.

Q. How did that come around? A. It was shipped there and was afterwards shipped to Gastonia.

Q. Have these invoices ever been receipted? No, sir.

Q. Had you receipted any invoices before that time? A. Yes, sir, the December before.

Q. Where would you have kept them? A. In the books in the same manner.

Q. Examine that book and see what it is? A. This is a letter book of W. L. Wells, private.

Q. Where was that book kept? A. In the safe.

Q. Did you have any knowledge of the contents of it? A. No, sir, none whatever.

Q. Turn to the page there that you have your finger in, that is a copy of that letter of July 13th, 1900? A. Yes, sir (p. 58).

Q. Something has been said about the books, etc., of this company being kept in the safe of W. L. Wells & Co.; what size safe is that? A. It is quite a large safe.

Q. Where is the office of Luckett & Wells? A. 111 Mulberry St.

Q. Explain to the jury where that is. A. Just to the rear of W. L. Wells & Co. office; the rear ends come together.

Q. How far apart are they? I don't suppose over 30 or 40 feet.

Q. Any connection from the rear? A. No, sir.

Q. How far are they from the regular mode of communication? A. About half a square.

Q. Has Wells & Luckett a safe. A. A rather small one.

Q. What are kept in Wells & Luckett safe? Their books.

Plaintiffs Rest.

40 The following are the Exhibits referred to in the evidence introduced by the plaintiff:

EXHIBIT 1.

THE CHARTER OF INCORPORATION OF

THE

W. L. WELLS COMPANY.

Section 1. Be it known and remembered, that W. L. Wells, John T. Wells and George Butterworth, their associates and assigns, are hereby created a body politic and corporate, under the name and style of W. L. Wells Company, and by that name shall have succession for fifty years, shall have power to sue and be sued, contract and be contracted with, may have a corporate seal, and break and alter the same at pleasure.

Section 2. The capital stock of said corporation shall be fifty thousand dollars, divided into shares of five hundred dollars each, and as soon as ten thousand dollars of said stock is subscribed and paid for, said corporation shall have power to commence business.

Section 3. Said corporation is formed for the purpose of conducting a general cotton business, and may buy and sell cotton, and may transact a cotton factorage business, may advance money or supplies for the purpose of controlling shipments of cotton, may take and receive mortgages or deeds of trust upon property to secure said advances, and generally may have all powers conferred by Chapter 25 of the Annotated Code of 1892 necessary and requisite to carry out the purpose of said corporation.

Section 4. The Board of Directors of said corporation shall consist of three persons, whose numbers may be increased at any time by a majority vote of the stockholders, and said directors shall have power to elect all necessary officers, and prescribe the duties, salaries and tenure of such officers.

The foregoing proposed charter of incorporation is respectfully referred to the Honorable Attorney General for his advice as to the constitutionality and legality of the provisions thereof.

Jackson, Miss., April 26th, 1898.

A. J. McLAURIN, Governor.

The provisions of the foregoing proposed charter of incorporation

41 are not violative of the Constitution or laws of the State.
Jackson, Miss., WILEY N. NASH,
April , 1898. Attorney General.

EXECUTIVE OFFICE,

(State Coat of Arms),

Jackson, Mississippi.

The within and foregoing charter of incorporation of the W. L. Wells Company is hereby approved.

{Great Seal of the State of Mississippi.} In testimony whereof, I have hereunto set my hand and caused the Great Seal of the State of Mississippi to be affixed this 1st day of June, 1898.

By the Governor: A. J. McLAURIN.

J. L. POWER,
Secretary of State.

STATE OF MISSISSIPPI, Warren County, } *ss:*

I, J. D. Laughlin, Clerk of the Chancery Court of said county, hereby certify that the foregoing instrument of writing was filed in my office of record on the 19th day of July, 1898, at 11:30 o'clock A. M., and duly recorded in Charter Book No. 1, page 194, *et seq.*

{Seal of Chancery Court, Warren County.} Witness my hand and seal of said — this 19th day of July, 1898.
J. D. LAUGHLIN, Cler.
By J. L. HYLAND, D. C.

OFFICE OF SECRETARY OF STATE,

Jackson, Miss.

I, J. L. Power, Secretary of State, do certify that the charter hereto attached, incorporating the W. L. Wells Company, was, pursuant to

42 the provisions of Chapter 25 of the Annotated Code, 1892, recorded in the Book of Incorporations in this office.

{ Great Seal of the State of Mississippi. } Given under my hand and the Great Seal of the State of Mississippi hereunto affixed this 1st day of June, 1898.

J. L. POWER,
Secretary of State.

EXHIBIT 2.

THE CHARTER OF INCORPORATION OF

THE

W. L. WELLS COMPANY.

Section 1. Be it known and remembered that W. L. Wells, John T. Wells and George Butterworth, their associates and assigns, are hereby created a body politic and corporate, under the name and style of W. L. Wells Company, and by that name shall have succession for fifty years, shall have power to sue and be sued, contract and be contracted with, may have a corporate seal, and break and alter the same at pleasure.

Section 2. The capital stock of said corporation shall be fifty thousand dollars, divided into shares of five hundred dollars each, and as soon as ten thousand dollars of said stock is subscribed and paid for, said corporation shall have power to commence business.

Section 3. Said corporation is formed for the purpose of conducting a general cotton business, and may buy and sell cotton, and may transact a cotton factorage business, may advance money or supplies for the purpose of controlling shipments of cotton, may take and receive mortgages or deeds of trust upon property to secure said advances, and generally may have all powers conferred by Chapter 25 of the Annotated Code of 1892 necessary and requisite to carry out the purpose of said corporation.

Section 4. The Board of Directors of said corporation shall consist of three persons, whose numbers may be increased at any time by a majority vote of the stockholders, and said directors shall have power to elect all necessary officers, and prescribe the duties, salaries and tenure of such officers.

The foregoing proposed charter of incorporation is respectfully

43 referred to the Honorable Attorney General for his advice as to the constitutionality and legality of the provisions thereof.

Jackson, Miss., April 26th, 1898.

A. J. McLAURIN, Governor.

The provisions of the foregoing proposed charter of incorporation are not violative of the Constitution or laws of the State.

Jackson, Miss., April , 1898.

WILEY N. NASH, Attorney General.

EXECUTIVE OFFICE,

(State Coat of Arms),

Jackson, Mississippi.

The within and foregoing charter of incorporation of the W. L. Wells Company is hereby approved.

{Great Seal of the State of Mississippi.}

In testimony whereof, I have hereunto set my hand and caused the Great Seal of the State of Mississippi to be affixed this 1st day of June, 1898.

By the Governor:

A. J. McLAURIN.

J. L. POWER, Secretary of State.

OFFICE OF SECRETARY OF STATE,

Jackson, Mississippi.

I, J. L. Power, Secretary of State, do certify that the charter hereto attached, incorporating the W. L. Wells Company, was pursuant to the provisions of Chapter 25 of the Annotated Code, 1892, recorded in the Book of Incorporations in this office.

{Great Seal of the State of Mississippi.}

Given under my hand — the Great Seal of Mississippi hereunto affixed this 1st day of June, 1898.

J. L. POWER, Secretary of State.

44 STATE OF MISSISSIPPI, }
Warren county. } ss:

I, J. D. Laughlin, Clerk of the Chancery Court of said county, hereby certify that the foregoing instrument of writing was filed in my office for record on the 19th day of July, 1898, at 11:30 o'clock, A. M., and duly recorded in Charter Book No. 1, page 194, *et seq.*

Witness my hand and seal of said court, this, the 19th day July, 1898.

[SEAL.] J. D. LAUGHLIN, Clerk.
By J. L. HYLAND, D. C.

STATE OF MISSISSIPPI, }
Warren county. } ss:

I, J. D. Laughlin, Clerk of the Chancery Court of said county, hereby certify that the foregoing one page and eleven lines contain a true and correct copy of the charter of incorporation of the W. L. Wells Company, recorded in Book of *Chaters* No. 1, pages 194 *et seq*, as the same appears on file and of record in my said office.

Witness my hand and seal of said court, this 2nd day of May, A. D. 1902.

[SEAL.] J. D. *LAGHLIN*, Clerk.

STATE OF MISSISSIPPI, }
Warren county. } Chancery Court.

I, W. C. Martin, Sole Presiding Chancellor of the Fourth Chancery District of the State of Mississippi (said district including the county of Warren), do hereby certify that J. D. Laughlin, whose genuine signature appears to the foregoing certificate of copy of *chater* of W. L. Wells Company, is now, and was at the date of said certificate, the Clerk of the Chancery Court of said county, duly elected and qualified according to law; and that all his official acts as such are entitled to full faith and credit; that his said certificate is in due form of law; that the seal thereto attached is the genuine seal of said Chancery Court, and said court is a court of record.

Given under my hand at Vicksburg, Mississippi, this 2nd day of May, 1902.

W. C. MARTIN, Chancellor.

45 THE STATE OF MISSISSIPPI, Warren county. } Chancery Court.

I, J. D. Laughlin, clerk of said court, do hereby certify that Honorable W. C. Martin, whose genuine signature appears to the annexed and last above certificate of attestation, is now, and was at the date of said certificate, the sole Presiding Chancellor of the Fourth Chancery District (including said county of Warren), as therein stated, duly appointed by lawful authority and legally qualified; and that all his acts as such are entitled to full faith and credit, in judicature and thereout; that his said certificate and attestation are in due form of law. and that said Chancery Court is a court of record.

In testimony whereof, I have hereto set my hand and the seal of said court, at my office, in city of Vicksburg, Miss., this 2nd day of May, 1902.

[SEAL] J. D. LAUGHLIN, Clerk.

EXHIBIT 3.

Vicksburg, Miss., July 18, 1898.

Meeting of the Incorporators of W. L. Wells Co.

A meeting of the incorporators of the W. L. Wells Co. was held at the office of Miller, Smith & Hirsch, in the city of Vicksburg, this day. Present in person or by proxy, W. L. Wells, Jno. T. Wells, and George Butterworth.

Upon motion, Mr. John T. Wells was elected chairman of the incorporators, and on motion, Mr. Murray F. Smith, proxy of W. L. Wells, was elected secretary of the meeting.

The *chater* of incorporation of the Company, approved by the Governor of the State of Mississippi on the 1st day of June, 1898, was read over and adopted.

Books of subscription to the capital stock of said corporation were then opened, and W. L. Wells subscribed for ten shares of the capital stock of said corporation; John T. Wells subscribed for five shares and George Butterworth subscribed for five shares of the capital stock of said corporation. The meeting of the incorporators was thereupon adjourned.

JOHN T. WELLS, Chairman.

MURRAY F. SMITH, Secty.

Meeting of the Stockholders of W. L. Wells Co., July 18, 1898.

Vicksburg, Miss, July 18, 1898.

A meeting of the stockholders of the W. L. Wells Co. was this day held at the office of Miller, Smith & Hirsch, in the city of Vicks-

46 burg; present in person or by proxy, W. L. Wells by Murray F. Smith, proxy; John T. Wells in person, and George Butterworth by John T. Wells, proxy.

Thereupon, on motion of Murray F. Smith, proxy for W. L. Wells, it was moved that John T. Wells be elected chairman of the stockholders' meeting, and that Murray F. Smith, proxy for W. L. Wells, be elected secretary of said meeting, which motion was carried by a vote of all the stock then present.

On motion, it was resolved that W. L. Wells, John T. Wells, and George Butterworth be elected directors of this company, which motion prevailed, and thereupon the chairman declared said gentlemen elected directors of said Company.

On motion, the stockholders' meeting was then adjourned subject to the call of the chairman.

JOHN T. WELLS, Chairman.

MURRAY F. SMITH, Secty.

Meeting of Incorporators of W. L. Wells Co., July 18, 1898.

Vicksburg, Miss., July 18, 1898.

Meeting of the Incorporators of W. L. Wells Co.

A meeting of the incorporators of the W. L. Wells Co. was held at the office of Miller, Smith & Hirsch, in the city of Vicksburg, this day. Present in person or by proxy, W. L. Wells, John T. Wells, and George Butterworth.

Upon motion, Mr. John T. Wells was elected chairman of the incorporators, and, on motion, Mr. Murray F. Smith, proxy of W. L. Wells, was elected secretary of the meeting.

The *chater* of incorporation of the company, approved by the Governor of the State of Mississippi, on the 1st day of June, 1898, was read over and adopted.

Books of subscription to the capital stock of said corporation were then opened, and W. L. Wells subscribed for ten shares of the capital stock of said corporation; John T. Wells subscribed for five shares and George Butterworth subscribed for five shares of the capital stock of said corporation. The meeting of the incorporators was thereupon adjourned.

JOHN T. WELLS, Chairman.

MURRAY F. SMITH, Secty.

Vicksburg, Miss., July 18th, 1898.

A meeting of the stockholders of the W. L. Wells Co. was this day held at the office of Miller, Smith & Hirsch, in the city of Vicksburg; present in person or by proxy, W. L. Wells by Murray F.

47 Smith, proxy; John T. Wells in person, and George Butterworth by John T. Wells, proxy.

Thereupon on motion of Murray F. Smith, proxy for W. L. Wells, it was moved that John T. Wells be elected chairman of the stockholders' meeting, and that Murray F. Smith, proxy for W. L. Wells, be elected secretary of said meeting, which motion was carried by a vote of all the stock then present.

On motion, it was resolved that W. L. Wells, John T. Wells, and George Butterworth be elected directors of this company, which motion prevailed, and thereupon the chairman declared said gentlemen elected directors of said company.

On motion, the stockholders' meeting was then adjourned subject to the call of the chairman.

JOHN T. WELLS, Chairman.

MURRAY F. SMITH, Secty.

Exhibits 4, 5, 6 and 7 are the statements attached to the complaint.

LETTER OF FEB'Y 7, 1900.

Vicksburg, Miss., Feby. 7th, 1900.

Mr. John F. Love, Treasurer,
Gastonia, N. C.,

Dear Sir:—

Enclosed we hand you memo accounts showing ledger balances of your various accounts with interest at 6% on overdue amounts to Feby 1st. Trusting safely to hand, and satisfactory,

Yours very truly,

W. L. WELLS CO.
J. T. W., Secy & Treas.

Statement Page 89, Book 6.

John F. Love, Treas.,

In a/c with

W. L. Wells & Co.

Gastonia Cotton Manf'g. Co.....	$26,209 82	
Avon Mills	53,311 78	
Ozark Mills.....	13,633 04	
Int. 6% on overdue a/cs to Feby 1st.....	1,196 86	
		$94,351 50

E. E.

Vicksburg, Feby 7th, 1900,
W. L. WELLS CO.

48 **LETTER OF FEBRUARY 9, 1900.**

W. L. Wells, President. John T. Wells, Sec'ty and Treas. George Butterworth, Vice-Prest.

Established 1882. Incorporated 1898.

W. L. Wells Company.

Cotton Merchants.

Cable Address "Wells."

Yazoo City, Miss. Greeneville, Miss.

Edwards, Miss. Delhi, La.

Vicksburg, Miss., Feby. 9th, 1900.

Mr. John F. Love, Treasurer,
Gastonia, N. C.

Dear Sir:—

Your favor of the 7th inst., to our Mr. W. L. W., received to-day. We beg to acknowledge receipt of check enclosed for $13,683.04, covering 239 bales for Ozark Mills, for which we are exceedingly obliged.

We note your order for the full style one inch, also 1¼, and we will go on the market for this cotton at once, and do the best we can for you. There is a very strong demand for export and prices are sky high, and our purchases probably will look dear to you, but we will do the very best we can.

Mr. W. L. W. is absent to-day and will not return before Monday, at which time he will write you more fully.

Yours very truly,

W. L. WELLS CO.

J. T. W.

TELEGRAM.

March 6th, 1900.

John F. Love,
Gastonia, N. C.

When can we expect a remittance? It is absolutely necessary to remit at once. It must not be delayed. Want an answer.

W. L. WELLS CO.

49 **TELEGRAM.**

Gastonia, N. C., Mch. 6, 00.

W. L. Wells Co.,
Vicksburg.

Will remit to-day. Have been out sick for a week.

JNO. F. LOVE.

LETTER OF MARCH 6, 1900.

Vicksburg, Miss., March 6th, 1900.

John F. Love, Treas.,
Gastonia.

Dear Sir:—

We wired you this morning in reference to a remittance, and are just in receipt of your telegram saying that you would remit to-day, etc.

It is useless for us to rehash this matter, and we fully appreciate and believe you have been disappointed in making money arrangements, but have we not done our full share in carrying the load? We have made every shift we could conceive of, and have really hampered our business very considerably in order to help you out, but there is a limit to everything, and while we don't want to be unreasonable, at the same time you must admit that it is quite time the account should be shaped up, and this we must insist on. You have profited many thousand dollars at our expense and discomfort, and while we are very glad indeed that this is the case, we must say that we are growing very tired of the load, and we think it is time somebody else was shouldering it. We enclose statement to 1st inst.

Yours truly,

W. L. W.

W. L. WELLS CO.

50 John F. Love, Treas.,

In a/c with

W. L. Wells Co.

STATEMENT OF ACCOUNTS TO MARCH 1, 1900.

1900.

Feb. 1st.	To balance a/c rendered	$94,351 50
	Int. on same to 2/9-9 days at 6 %.	141 48
	Int. on $80,788.46, 2/9-28-19 days at 6 %.	255 64
		$94,748 62
Fby. 9th	By cash	$13,633 04
	Balance due March 1st, 1900	$81,115 88

E. & O. E.

Vicksburg, Mch. 5th, 1900.

LETTER OF APRIL 2, 1900.

Vicksburg, Miss., April 2nd, 1900.

Mr. John F. Love, Treas.,
Gastonia, N. C.

Dear Sir:—

Enclosed please find statement of account to April 1st, showing balance due us of $53,546.41.

Please report on same, and remit as liberally as you possibly can at your early convenience, and oblige,

Yours very truly,

W. L. WELLS CO.

J. T. W. Enc.

51 **STATEMENT OF ACCOUNTS TO APRIL 1, 1900.**

John F. Love, Treas.,

In *a/c* with

W. L. Wells Co.

1900.			
Mch. 1.	To balance as per acct. rendered...	$81,115 58	
	Int. on same to Mch. 8th 8 days at 6 per ct.....	108 16	
	Int. on $60,539.76 to M'ch 12—4 days at 6 per ct.....	40 36	
	Int. on $53,231.32 to M'ch 31—19 days at 6 per ct.....	168 57	
	Credits—		
Mch. 8th.	By cash remittance.....		$20,575 82
12th.	By cash remittance.....		7,308 44
	Balance due April 1st.....		53,548 41
		$81,432 67	$81,432 67
April 1st to balance.....		$53,548 41	

E. E.

Vicksburg, April 1st, 1900.

LETTER OF MAY 7, 1900.

Vicksburg, May 7, 1900.

Mr. John F. Love, Treas.,
Gastonia, N. C.

Dear Sir:—

Enclosed we beg to hand you statement of your account to May 1st, showing balance due of $44,067.91. Please investigate and report on same at your early convenience, and oblige,

Yours very truly,

J. T. W. W. L. WELLS CO.

52 **STATEMENT OF ACCOUNTS TO MAY 1, 1900.**

John F. Love, Treas.,

In a/c with

1900.			W. L. Wells Co.
April 1st.	To balance as per a/c rendered..	$53,548 41	
	Int. on same to Apr. 9th, 9 days, at 6%.....	80 32	
	Int. on $43,834.19—Apl. 9–30, 21 days, 6%.....	153 40	

Credit.

April 9th.	By cash remittance.....		$ 9,714 22
	Balance due May 1st.....		44,067 91
		$53,782 13	$53,782 13
May 1st, 1900.	To balance.....	$44,067 91	

—EE—

Vicksburg, May 1st, 1900.

53 **STATEMENT OF ACCOUNT TO JULY 1, 1900.**

John F. Love, Treas.,
In a/c with
W. L. Wells Co.

1900.			
June 1st.	To balance as per a/c rendered...	$44,295 64	
	Int. on same June 1–5, 5 days, at 6 %.....	36 95	
	Int. on $28,295.64, June 5–22, 17 days, at 6 %	80 29	
	Int. on $18,295.64, June 22–30, 8 days, 6 %	25 25	
22nd	Invoice 64 B/C Dod, Gastonia C. Mfg. Co	3,283 18	
	Credits.		
June 5th.	By cash remittance.....		$16,000 00
22nd	" " "		10,000 00
	Balance		21,720 51
		$47,720 51	$47,720 51
July 1st.	To balance.....	$21,720 51	

—EE—

Vicksburg, June 30th, 1900.

W. L. WELLS CO.

John F. Love, Treas.,
In a/c with
1900. W. L. Wells Co.

STATEMENT OF ACCOUNT TO AUGUST 1, 1900.

July 1st.	To balance as per a/c rendered.....	$21,720 51
	Int. on same, 31 days, at 6 %..	112 22
	Amount due August 1st, 1900.....	$21,832 73

—EE—

Vicksburg, August 1st, 1900.

W. L. WELLS CO.

54 **STATEMENT OF ACCOUNT TO SEPTEMBER 1, 1900.**

John F. Love, Treas.,
In a/c with
W. L. Wells Co.

1900.		
Aug. 1st.	To balance as per acct. rendered.....	$21,832 73
	Less cash remittance August 3d.....	9,206 30
		$12,626 43
	Int. on balance 31 days at 6 per ct.....	65 24
	Amount due Sept. 1st, 1900.....	$12,691 67

E. E.
Vicksburg, Miss., Sept. 1st, 1900.
W. L. WELLS CO.

STATEMENT OF ACCOUNT TO OCTOBER 1, 1901.

Avon Mills, Gastonia, N. C.,
In a/c with
W. L. Wells Co.

1901.		
Aug. 15th.	To balance as per acct. rendered.....	$28,680 77
Sept. 30th.	To int. on same to Oct. 1st, 1901, 47 days at 6 per ct.....	224 66
	Amount due Oct. 1st, 1901.....	$28,905 43

E. E.
Vicksburg, Sept. 30th, 1901.
W. L. WELLS CO.

STATEMENT OF ACCOUNT TO OCT. 1, 1901.

Gastonia Cotton Manufacturing Co.,
In a/c with
W. L. Wells Co.

1901.		
Aug. 15th.	To balance as per acct. rendered.....	$37,585 29
Sept. 30th.	To int. on same to Oct. 1, 1901, 47 days at 6 per ct.....	294 40
	Amount due Oct. 1st, 1901.....	$37,879 69

E. E.
Vicksburg, Sept. 30th, 1901.
W. L. WELLS CO.

55 **STATEMENT OF ACCOUNT TO JUNE 1, 1900.**

Copy of Statement Page 121, Book No. 6.

John F. Love, Treas.,

In a/c with

W. L. Wells Co.

1900.		
May 1st.	To balance as per acct. rendered	$44,067 91
	Int. on same to May 31st, 31 days at 6 per ct...	227 73
	Balance due June 1st, 1900	$44,295 64

E. E.
Vicksburg, June 1st, 1900.

W. L. WELLS CO.
W.

STATEMENT OF ACCOUNT TO MARCH 1, 1900.

Copy of Statement Page 105, Book No. 6.

John F. Love, Treas.,

In a/c with

W. L. Wells Co.

1900.		
Feb. 1st.	To balance account rendered	$94,351 50
	Int. on same to 2-9—9 days at 6 per ct.	141 48
	Int. on $80,788.46, 2-9-28—19 days at 6 per ct.	255 64
		$94,748 62
Feb. 9th.	By cash	13,633 04
	Balanace due March 1st, 1900	$81,115 88

E. & O. E.
Vicksburg, March 5, 1900.

W.

56 **STATEMENT OF ACCOUNT TO JULY 1, 1900.**

Copy of Statement Page 123, Book No. 6.

John F. Love, Treas.,

In a/c with

W. L. Wells Co.

1900.				
June	1st.	To balance as per acct. rendered	$44,295 64	
		Int. on same June 1-5 5 days at 6 per ct	36 95	
		Int. on $28,295.64, June 5-22, 17 days 6 per ct	80 29	
		Int. on $18,295 64 June 22-30, 8 days 6 per ct	24 45	
	22nd.	Invoice 64 B-C DOD, Gastonia C. Mfg. Co	3,283 18	
		Credits—		
June	5th.	By cash remittance		$16,000 00
June	22nd.	By cash remittance		10,000 00
		Balance		21,720 51
			$47,720 51	$47,720 51
July	1st.	To balance	$21,720 51	

E. E.
Vicksburg, June 30th, 1900.

W. L. WELLS CO.
W.

57 **STATEMENT OF ACCOUNTS TO MAY 1, 1900.**

Copy of Statement Page 120, Book No. 6.

John F. Love, Treas.,

In a/c with

W. L. Wells Co.

1900.			
Apl. 1st.	To balance as per acct. rendered,	$53,548 41	
	Int. on same to Apl. 9, 9 days at 6 per ct.....	80 32	
	Int. on $43,834.19, Apl. 9-30, 21 days 6 per ct..	153 40	
	Credit—		
Apl. 9th.	By cash remittance.....		$ 9,714 22
	Balance due May 1st.....		44,067 91
		$53,782 13	$53,782 13
May 1st.	To balance.....	$44,067 91	

E. E.

Vicksburg, May 1st, 1900.

W.

LETTER OF AUGUST 12, 1901.

Vicksburg, Miss., August 12, 1901.

Mr. John F. Love, Gastonia, N. C.:

Dear, Sir,—Herein we beg to hand you statements of accounts of the Gastonia Cotton Manufacturing Company and the Avon Mills, with interest at 6% calculated to August 15, 1901. The interest on all charges has been calculated at thirty days from the date shipments were made, and on all credits from the day the money was received by us.

Please check over these statements in order that they may be verified by you when our Mr. W. L. W. arrives there the latter part of this week. As you are aware, our firm will be dissolved on September 1st, and it will be necessary to have this matter closed prior to that date.

Very truly yours,

W. L. WELLS CO.

J. T. W.
8—237

58 MEMORANDUM.

Statements were sent August 12, 1901, showing balance due as of August 15:

By the Gastonia Cotton Manufacturing Company..... $37,585 29
By the Avon Mills 28,680 77

Exhibits 8 and 9 were full statements of the accounts of the Wells Company against the two defendants, the Avon Mills and the Gastonia Cotton Manufacturing Company, charging against them cotton sent out in the exhibits attached to the complaint and giving credit for payments made and charging interest and showing the balances due, as contended for by the plaintiff.

It is agreed that it is not necessary to insert these exhibits, as the substance of them is shown by the other exhibits.

EXHIBIT "A."

Vicksburg, Miss., July 13, 1900.

Mr. John F. Love, Gastonia:

Dear Mr. Love,—I have yours of the 26th ulto. and have been waiting hoping for a favorable reply, but this eastern complication has knocked our friend clean out of the box. As to myself, as stated to you when there, I am tied up in a long deal, which seems without termination, and, until it is settled, I can't do anything; and in justice to you, I will say I don't see any prospects of a settlement except through the courts, and you know what this means. So to sum the matter up, you can only depend on me for the original $10,000.00, with a bare possibility of later on increasing it to $25,000.00, but don't depend on the latter. Hope you are progressing all right. Sorry I can't come up as you suggest, but have made my arrangements to go to Canada some time soon, and will see you on my return about the middle of September. Crop prospects improving, but I don't think the crop can exceed last years; but with the Eastern complications this will be enough. If you can possibly do so, please remit us balance on account, as we need it to settle up matters, which I should like to do before leaving next Wednesday.

Yours truly,

W. L. WELLS.

59

EXHIBIT B.

Invoice of 64 bales cotton shipped by W. L. Wells Company on board A. & W. R. R. for Gastonia, N. C., for account and risk of ourselves, as per order received through Gastonia Cotton Manufacturing Company:

Dod. 6413/C: St. & G. M. 1-1/16 Staple.

3203 lks. @ 10¼c	3283 18
a/c	5923 12
	9206 30

Freight Prepaid.
To be delivered when paid for.

Paid

—E. E.—

W. L. WELLS CO.,
Aug. 3, 1900.

Vicksburg, June 22nd, 1900.

W. L. WELLS CO.

(The above three lines *was* written across the face of invoice.)

Exhibit "B."

EXHIBIT C.

$9,206.30. GASTONIA BANKING CO.,

Gastonia, N. C., Aug. 1, 1900.

Pay to the order of W. L. Wells Co.,
Nine Thousand, Two Hundred, Six & 30/100 Dollars.
To Hanover National Bank,
No. 4423 New York, N. Y.

JOHN F. LOVE,
Cashier.

Ex. "C."

EXHIBIT D.

Vicksburg, Miss., August 31, 1900.

Mr. John F. Love, Treasurer,
Gastonia, N. C.

Dear Sir:—

Enclosed we beg to hand you a statement of your account to September 1st, showing balance due us of $12,691.67. May we ask that you remit us by return mail in full for this balance, and oblige,

Yours very truly,

W. L. WELLS CO.

60 Endorsement by John F. Love:—

$10,000.00 Stock Loray Mills.
2,691.67 Interest.

$12,691.67 Balance.

We want to see your Mr. W. L. Wells about it when he comes to see us.

Yours— JOHN F. LOVE, Treas.

Ex. " D."

EXHIBIT E.

No. 8.

Invoice of 50 bales cotton, shipped by W. L. Wells Company, on board Ala. & Vicksburg R. R. for Gastonia, N. C., for account and risk of Gastonia Cotton Manufacturing Company, as per order, received through do. October 1, 1900.

LIN / E
Wells.

50 B / C St. M. & Above 1 to 1 1 / 16 Staple,
25583 lbs. at 11c. $2814.13

Freight Prepaid.

—E. E.—

Vicksburg, Oct. 2, 1900.

No. 1 W. L. WELLS CO.

LIN / E

Paid

W. L. WELLS CO.

Oct. 11, 1900.

The annexed invoice (Defendant's Exhibit E.) is one of a series of invoices sent by plaintiffs to defendant, as set forth in the testimony—all of said invoices being alike in form and differing only in dates and amounts. It is not necessary, therefore, to annex more than one of said invoices.

Invoice of 100 bales cotton, shipped by W. L. Wells Company, on board Ala. & Vicksburg R. R. for Gastonia, N. C., for account and risk of Gastonia Cotton Manufacturing Company, as per order, received through do. October 1, 1900.

61

EXHIBIT J.

J E S O

O. 100 B/c St. & G. M. 1 to 1-1/16 Staple,
51355 lbs. @ 10¼c 5263.89

Freight Prepaid. Total, 40357.59
Less Check, 25000.00

Enclosed. 15357.59

Paid

W. L. WELLS CO.,

—E. E.— Dec. 3, 1900.

(The above three lines were written across the face of invoice.)

Vicksburg, Oct. 25, 1900,

W. L. WELLS CO.

"Exhibit J."

"EXHIBIT Q."

Gastonia, N. C., Dec. 1, 1900.

Pay to the order of W. L. Wells Co.,

$15,357.59 GASTONIA BANKING CO.,

Fifteen thousand, three hundred, fifty-seven and 59/100 Dollars.

To Hanover National Bank, JOHN F. LOVE,
No. 4921 New York, N. Y. Cashier.

"EXHIBIT R."

$25,000.00 GASTONIA BANKING CO.,

Gastonia, N. C., Nov. 19, 1900.

Pay to the order of W. L. Well Co.,
Twenty-five Thousand Dollars.

To Hanover National Bank, JOHN F. LOVE,
No. 4865 New York, N. Y. Cashier.

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"EXHIBIT S."

Vicksburg, Miss., October 4, 1900.

Mr. John F. Love,
Gastonia,

Dear Mr. Love:—

In reference to the Loray matter, I have arranged to take the $50,000.00 stock, but want you, as stated when there, to let this come in on the last payment, say about 1st January next. This will enable me to clean up my deal I wrote you about last spring, and besides for the next 90 S/s, I will be crowded somewhat for money to carry on my business. I am going to make a change in my present firm after this season, so don't want my arrangements with you and the Loray known to them, hence in writing me about this please mark your letters "*Personal.*"

Please keep me posted about how the Loray is progressing. With regards to Mr. Gray, I am,

Yours truly,

W. L. WELLS.

P. S.: When is your idea to organize?

EXHIBIT "T."

Gastonia, N. C., February 2, 1901.

W. L. Wells, Esq.,
Vicksburg, Miss.,

My Dear Mr. Wells:—

It has been some time since we heard from you, but we trust the New Year is treating you well and you were not caught in "the squeeze." Our work is moving on fine; we are now finishing up all our buildings, will finish in another week or two, and we are now putting in our machinery, have already received about 75 cars machinery and more on the road. We have a very handsome mill indeed, and very substantial and massive. We will go right ahead with the machinery, but on account of the Chinese troubles, market, etc., we will not start running until in the spring or summer. Cotton is too high and goods too cheap and our commission house are looking for a change *soon*.

We hope to put the roof on our cotton house and finish it up this month, eight houses 50x150, two stories high, to hold 15 to 20,000 bales cotton.

I have paid in your $50,000.00 stock and can send you certificates

63 any time in any way you suggest, and before issuing them will await your advice. Please have our account with your house credited with the amount. We are putting the roof on my house now and we hope soon to have it closed in and be putting up the inside finish. It will be a very comfortable place. We are all well but myself; I have had a bad cold and hoarseness.

I remain, awaiting your favors,

Yours,

JOHN F. LOVE.

The following are the exhibits referred to in the evidence introduced by the defendant and in the cross-examination of its witness. Some of the exhibits referred to in the cross-examination of the defendants' witness will be found among the plaintiff's exhibits and are, therefore, not repeated here.

EXHIBIT —.

State of North Carolina,
County of Gaston.

Articles of agreement in reference to the formation of a corporation pursuant to the laws of North Carolina, as contained in sections 677 to 680 of the Code and the various acts amendatory thereof.

First. We, John F. Love, George A. Gray, Frost Torrence, J. M. Sloan, W. T. Rankin and our associates, agree to enter into, form and organize a corporation under the laws of North Carolina.

Second. The name of the corporation shall be "The Loray Mills."

Third. The principal place of business shall be at or near Gastonia, Gaston county, N. C.

Fourth. The duration of the corporation shall be thirty (30) years.

Fifth. The amount of the capital stock of the corporation shall be one million ($1,000,000) dollars, divided into ten thousand (10,000) shares of the par value of one hundred ($100) dollars each.

Sixth. The business of the corporation shall be to manufacture any and all kinds of warps, yarn, cloth, prints and other fabrics made of cotton, wool or other materials, to purchase, exchange and

64 sell any and all kinds of goods, wares and merchandise, with the power to take, purchase, hold, exchange, lease, sell and convey such real estate as may be necessary to the prosecution of such business, to construct, erect and maintain all such houses, buildings and structures as may be needful, to manufacture, repair and sell all such machinery and supplies as may be useful, and to do any and all things necessary to the proper conduct of the aforesaid business.

In testimony whereof we have hereunto set our hands and seals. Witness:

JOHN F. LOVE, [SEAL.]
GEORGE A. GRAY, [SEAL.]
FROST TORRENCE, [SEAL.]
J. M. SLOAN, [SEAL.]
W. T. RANKIN, [SEAL.]

State of North Carolina,
County of Gaston.

The execution of the foregoing articles of agreement was this day duly acknowledged before me, C. C. Cornwell, Clerk of the Superior Court, in and for Gaston county, North Carolina, by John F. Love, George A. Gray, Frost Torrence, W. T. Rankin and J. M. Sloan, the parties thereto.

Witness my hand, this the 16th day of February, 1900.

C. C. CORNWELL,
Clerk of the Superior Court, Gaston county, North Carolina.

MOTION TO DISMISS OR JUDGMENT AS ON NON-SUIT; MOTION OVERRULED.

At the close of plaintiff's testimony, the defendant moved to dismiss the complaint, or for judgment, as in case on non-suit under the statute of the State of North Carolina, in such cases made and provided, it being Chapter 109 of the Public Laws of 1897 as amended by Chapter 131 of the Public Laws of 1899.

The court overruled the motion.

FIRST EXCEPTION.

The defendant thereupon moved to dismiss the action, because the court, as appears from the testimony, has no jurisdiction thereof, there being no evidence introduced to show that the plaintiff, W. L. Wells Company, was, at the time this action was brought, or is now,

65 a corporation duly created and organized or invested with the right to bring this action under the laws of the State of Mississippi and that the plaintiff has no legal capacity or right to sue in this court, and upon the further ground that the plaintiff's testimony shows that the plaintiff has no legal capacity to sue in this court and that this court has no jurisdiction of the action.

Motion of the defendant was overruled and the defendant then and there, while the jury was still at bar, duly excepted.

JAMES E. BOYD, [SEAL.]
U. S. Judge.

The defendant, the Gastonia Cotton Manufacturing Company, to maintain the issues on its part, introduced oral evidence and exhibits as follows:

EVIDENCE FOR DEFENDANTS.

JOHN F. LOVE INTRODUCED BY DEFENDANTS.

Q. What business are you engaged? A. Cotton manufacturing.

Q. What is your connection with the Avon Mills? A. Secretary and treasurer.

Q. Of the Gastonia Mills? A. Secretary and treasurer.

Q. How long have you kept this office? A. Of the Gastonia Mill since 1888; of the Avon since 1896.

Q. How much stock in the Avon Mill do you own? A. Fraction over a fourth in the Gastonia Mill and a fraction over a half in the Avon Mill.

Q. How much does Geo. Gray own in the Avon Mill? A. One fourth and one fourth in the Gastonia Mill.

Q. Where is the financial business of the office done? A. In the office of the Gastonia banking company of Gastonia.

Q. Who is the president of the banking company? A. John F. Love.

Q. What has Mr. Gray to do with the Gastonia and Avon Mills? A. He is president.

Q. How long have you known Mr. W. L. Wells? A. Since 1896 in a business way. I met him in '97.

Q. Did you do any business with him in '97 and '98? A. Yes, sir, in the name of the Gastonia and Avon Mills, and he did business with me in the name of W. L. Wells & Co. In '98, '99 and 1900 and 1901 he did business with me under the name of W. L. Wells Co.

Q. When was the Loray Mill organized? A. It was chartered Feb. 19th, 1900.

Q. Have you that charter? A. Yes, sir.

66 Q. Produce it.

(Copy of charter filed Exhibit —) (p. 113).

Q. Who were the incorporators? A. Geo. Grey, J. M. Sloan, W. T. Rankin, Frost Torrence and John F. Love.

Q. Did W. L. Wells come to North Carolina in the fall of '98? A. Yes, sir.

Q. Did you meet him at Gastonia? A. Yes, sir.

Q. Go on and state what, if anything, occurred between you and Mr. W. L. Wells as to the business of the season of '98 and '99. A. Mr. Wells makes us a visit every summer and during his visit there we talked over our cotton matters and during the talk of the cotton matters we talked of the organization of the Loray Mill; he had been buying cotton for the Avon and Gastonia Mills for some time and we wished him to continue buyibg it.

Q. Was the business settled up for the year '98 and '99? A. Yes, sir, everything that the Gastonia and Avon Mills owed.

Q. Did you come back in the fall of '99 and make arrangements for the season of '99 and 1900? A. Yes, sir.

Q. At that time what was the condition of the Lorey Mills? A. We were going ahead with the buildings; he saw the buildings.

Q. Did he examine the location of the plant? A. Yes, sir.

Q. Did you advise with him about the location of the plant? A. Yes, sir, we did.

Q. Who do you mean by we? A. Mr. Wells and I.

Q. What occurred between you and Mr. Wells, if anything, in regard to his taking stock in the enterprise?

(Objection by plaintiffs; overruled; testimony admitted; exceptions.)

A. During his visit to us we talked of taking stock in the Laray Mill and he agreed that he *y*ould take $10,*0*0.00 with us any way. He was considering moving to Charlotte and he said if he did he would take $50,000.00 with us and that he had a friend who would take an equal amount. That was in the fall of '99.

Q. What inducement, if any, did you hold out with him to take share in this enterprise? A. We told him if he would come in with us and help us to get this up, we told him we wanted him to be the purchasing agent for the mills for the cotton and buy all our cotton for the three mills, and if he did so we would like to make him one of our directors and vice-president of the mill.

67 Q. At that time the Loray was not incorporated? A. No, sir.

Q. You had bought a site and the buildings were being erected? A. Yes, sir.

Q. Did you buy cotton from Mr. Wells in the fall of '99? A. Yes, sir, and in the spring of 1900.

Q. When did you next see Mr. Wells? A. Mr. Wells visited us the 10th of May, 1900.

Q. What was the condition of the Loray enterprise then; had it been *charted?* A. Yes, sir.

Q. What was the condition of the buildings? A. They were being erected.

Q. How far were these buildings from the town of Gastonia? A. One mile.

Q. Did you take Mr. Wells to see the place? A. Yes, sir.

Q. Did you consult with him about the place? A. Yes, sir.

Q. What did he say then, if anything, about taking stock in this enterprise? A. He was still undecided that he would take stock, but hadn't decided as to the amount. He wrote us before coming up on the 10th of May that he would come to see us and would decide what he would take. He said he was going to try to bring his friend with him, but he couldn't come. He came and talked about it and he said he would go back and talk to his friend about the whole thing, and let us know.

Q. Did you receive any reply? A. Yes, sir, July 13th.

Q. What did you in consequence of that letter? A. In that letter he asked me to remit the balance due him and according to agreement from that letter——

Q. What was the agreement as for payin*f* for this cotton? A. The agreement was that this cotton should be shipped to us in the fall and spring and we should remit for it for so many bales per month and whatever amount of stock he was to take was to be taken out of this cotton.

Q. Was the cotton purchased under that agreement? A. Yes, sir.

Q. You received the letter of July the 13th? A. Yes, sir.

Q. What did you do then? A. A few days after I took the account and deducted the $10,000.00 and remitted him the balance.

Q. What reply, if any, did you get to that remittance? A. I got the bills receipted.

Q. They have been introduced in evidence? A. Yes, sir.

Q. How much did you find due after deducting the $10,000.00? A. Invoices for 64 bales of cotton—$3,283.13.

Q. To whom did you send that check? A. W. L. Wells Co.

68 Q. What reply did you get? A. I got a receipted voucher.
Q. What words were written across the document? A. Paid. Aug. 3rd, 1900.
Q. What did you do, if anything, with the $10,000.00? A. I placed it to Mr. Wells' credit at the Laray Mills.
Q. That was actual cash paid to the Lorey Mills? A. Yes, sir.
Q. And was afterwards expended by the Lorey Co. for what? A. Yes, sir, for work that was done.
Q. Have you the books showing the payment? A. Yes, sir.
Q. Through what bank was it paid? A. Gastonia Banking Co.
Q. You have the books showing the payment? A. Yes, sir.
Q. Did you receive a statement from the Wells Co. dated Aug. 1st? A. Yes, sir.
Q. Your letter to them enclosing check for $9,206.30 was mailed the date of the check? A. Yes, sir.
Q. According to the custom of the usual course of mail would it or not meet this statement mailed from Vicksburg the 1st of Aug.? A. Yes, sir, it would.
Q. Did you receive a statement from Wells Co., dated Sept. 1st? A. Yes, sir.
Q. Has your reply been put in evidence? A. Yes, sir (p. 59).
Q. Did you get any reply to that reply? A. No, sir.
Q. Have you ever received any reply to that reply? A. No, sir.
Q. Have you, until the beginning of this controversy, been called upon to pay for the Avon and Gastonia Mills the $10,000.00 which you then paid for the Lorey Mill? A. No, sir.
Q. Has any officer or agent for the Wells Co. called upon you for that money before this controversy? A. No, sir.
Q. When did you next see Mr. W. L. Wells? A. I saw him in Sept. 1900 in Gastonia.
Q. From what place was he coming? A. My understanding was that he had been to Canada.
Q. Go on in your way and state what conversation occurred between you and Mr. Wells in regard to buying cotton for the season of 1900 and 1901 and what conversation you had if any, in regard to his taking interest in the Lorey Mills.

(Objection by plaintiffs; objection overruled; testimony admitted; exceptions.)

A. Mr. Wells made us a visit and was with us a couple of days and during his visit we spoke of cotton as usual and also spoke of the Lorey Mill; we told him that we would like for him to continue

69 buying our cotton as before and if he carried out the agreement about the Lorey stock we wanted him to continue buying our cotton, but that we had an offer from another party who would become interested with us, but that we would give him the preference before making the other trade.

Q. What did he reply to that? A. He said after talking with him, that he would take the stock, the balance we first talked, about the $50,000.00, and that he would go home and let me know in a few days. In the meantime we had to have some cotton and he went on home and commenced shipping us cotton.

Q. What was the condition of the Lorey Mill at that time? A. The buildings were going on up and I think we had 200 tenement houses erected.

Q. Did he see that property? A. Yes, sir.

Q. Talk to you about it? A. Yes, sir.

Q. Did you or did you not advise with him about the business? A. We did.

Q. When next did you hear from him? A. Dated 4th of Oct. and I got it about the 6th. That letter has been introduced in evidence.

Q. Did you or did you not pay for all the cotton that was shipped to your mills in the fall of 1900 that was due under the contract before Dec. 3rd? A. I did.

Q. How did you pay for it? A. I paid for it in New York check.

Q. How many checks? A. I think there were two or three.

Q. Did you send him a check for $25,000.00? A. Yes, sir.

Q. Why did you send that check? A. He had been shipping us some cotton and wanted us to make a payment on it.

Q. Did you direct how that should be applied? A. No, sir.

Q. After the 1st of Dec. did you calculate how much was due for the fall purchase? A. Yes, sir.

Q. How much was due? A. A little over $40,000.00 less the $25,000.00 that we had paid him.

Q. What did you do then? A. I remitted him a check for the balance, $15,357.59.

Q. With that check you enclosed what paper? A. The original invoices including the check.

Q. Did that include the invoice upon which that statement made that has already been introduced in evidence? A. Yes, sir.

Q. As I understand you, that enclosure was the $15,357.59 check, and this particular invoice with the statement in it showed how the $15,357.59 check was calculated to be used? A. Yes, sir.

70 Q. What reply did you get to that? A. I received the invoices receipted.

Q. How long have you kept books? A. Over 20 years.

Q. What application was made with that $25,000.00? A. In payment of the bills enclosed.

Q. The bills were dated what date? A. The bills were dated in Oct. and Nov. 1900.

Q. Was any part of it applied on the bills of the season of '99 and 1900? A. No, sir.

Q. Did they send you any notice that the balance was due? A. No, sir.

Q. How much was due from your two companies to the Wells Co. in Dec. 1900 after this $15,357.59 payment was made? A. $40,681.08.

Q. Have you the invoices constituting that gross sum? A. Yes, sir.

Q. What did you do with that $40,000.00? A. I placed it to Mr. Wells' credit for Lorey Stock.

Q. Was that sum paid to the Lorey Mills' treasurer by you? A. Yes, sir, in cash.

Q. What became of it? A. It was expended in the work of the mill.

Q. Have you the books showing that payment? A. Yes, sir.

Q. When were they made? A. $10,000.00 Aug. 2nd, 1900. Dec. 3rd, 1900, $40,000.00.

Q. When, if at all, did the Wells Co. make demand on you for that $40,000.00? A. They made demand in Aug. 1901. Not until then.

Q. When they made that demand, they also demanded what else? A. They demanded the $10,000.00 with interest.

Q. Did you write Mr. Wells in Feb. 1901, that letter that has been introduced in evidence? A. Yes, sir.

Q. Did you receive any reply to that letter? A. No, sir.

Q. What does Mr. Wells refer to in his letter of Oct. 4th when he says he wanted you as stated when there to let this come in on the last payment or about the first of Jan. next? A. I take it as referring to the cotton payment.

Q. Anything said in his visit here about the cotton payments? A. Yes, sir, he wanted to know how we wanted to pay for the cotton.

Q. What was agreed? A. I told him we would pay for it along as usual, make our regular monthly payment, and whatever stock he took was to be taken out of this.

Q. What arrangement was this he didn't want any other of his firm to know? A. I suppose he was going to change his firm and was going to take up our business alone and buy the cotton for our mills; he told me that.

71 Q. What did he tell you about it when he was here? A. Told me that he was going to make a change in his firm and that he would take up our business entirely and buy the cotton for all of our mills; that he was getting tired of the other general business.

Q. How many bales of cotton per annum would the Lorey Mill consume if worked in full capacity? A. In the neighborhood of 30,000.

Q. How much would the Avon? A. 2,000 and the Gastonia, 3,000.

Q. What kind of cotton does the Avon and Gastonia use? A. Staple cotton exclusively.

Q. Where is that raised? A. On the Mississippi river.

Q. What would be reasonable compensation for the purchasing agent of these three mills per annum? A. I have been told by reliable cotton men that it was worth $25,000.00 a year.

Q. Have you formed an opinion as to what it was worth? A. Yes, sir, I have, it was worth $25,000.00 a year.

Q. When did the W. L. Wells Co. for the first time claim that the Avon and Gastonia Mill owed this large sum of money? A. Aug. 1901.

Q. At that time what was the condition of the Lorey Mill? A. It was being reorganized.

Q. From Feb. 2nd, 1901, the date of your letter to Mr. Wells, which has been introduced in evidence, to Aug., 1901, did the Wells Co. ever make demand on you from the Gastonia Mill or the Avon Mill this sum of money? A. No, sir.

Q. Whom did you know as the representitive of the Wells Co.? A. W. L. Wells only.

Q. Did you have any transaction with any one *esle* of the W. L. Wells Co? A. No, sir, I did not have any personal intercour*es* with anyone else but W. L. Wells.

CROSS EXAMINATION.

Q. You own one-fourth of the Avon, one-half of the Gastonia, and how much of the Gastonia Banking Co.? A. All of it.

—. You are the cashier and whole thing in the Gastonia Banking Co.? A. Yes, sir.

Q. You commenced doing business with W. L. Wells in 1896? A. Yes, sir, I think so.

Q. Don't you know it? A. Yes, sir.

Q. You solicited that business didn't you? Your Uncle Alonza Abernathy went out to Vicksburg? A. Yes, sir, and bought 800 bales of cotton for us.

Q. Opened up business through W. L. Wells & Co.? A. Yes, sir.

72 Q. You continued to do business with W. L. Wells & Co. until the season of 1898 and 1899 when you did business with the W. L. Wells Co.? A. Yes, sir.

Q. At the very beginning of the business of the W. L. Wells Co., wasn't there a change started right at once? A. In what respect?

Q. Didn't Mr. Wells notify you that he had formed this corporation that other people were interested with him in the business; and that he or this concern could not carry you in the future as he had done in the past? A. No, sir.

Q. Didn't the W. L. Wells Co. send to you written articles of agreement early in the fall of 1898 by which the Avon and Gastonia Mills were not to take the cotton until they paid for it? Had to pay for it as they took it out of the warehouse? A. These papers were sent us, but nothing signed.

Q. Weren't you notified of the change? A. They were sent to us on account of the change in cotton transaction suggested by Mr. Wells. When we first began dealing with Mr. Wells we bought 800 bales of cotton to be shipped 200 B-C weekly, so many bales, a*l*d were shipped on bill of lading and sight draft which was met promptly. The next season, if I remember it was transacted in the same way. The next season, the one you speak about, he was in our town and said that the rates of insurance and storage were so high in Vicksburg that he would prefer shipping the cotton to us so that we could store it and insure it as we could do it much cheaper and allow us to pay for the cotton so many bales per month and at his suggestion we allowed him to ship the cotton. Our first agreement was to give him warehouse receipts for it and after investigating that, he decided that they were no good in Miss. and that he could not use them, but afterwards sent us these contracts to sign and asked us to sign them and have them recorded, which we declined to do and he waived the question and the bills through the season, as can be shown, were marked on the bottom of the bill to be delivered when cotton is paid for; we received the cotton in the fall of the year, put it in the warehouse and remitted him monthly.

Q. Then you were notified that he had changed his business to W. L. Wells Co.? A. I knew it from the letter head, I was not notified of it.

Q. Didn't you know it from correspondence? A. No, sir, except the signatures of the letters.

Q. You didn't know it specifically? A. Not that I remember.

Q. Didn't you on Sept. 22nd, 1898, address Messrs. W. L. Wells Company, Vicksburg, Miss., Gentlemen, etc.? You wrote to the W. L. Wells Co. on Sept. 22nd? A. Yes, sir.

73 Q. Then you knew of the existence of the W. L. Wells Co.? A. Yes, sir.

Q. You solicited business with them right at the beginning of Sept. season 1898, according to this letter; you were anxiously waiting advices? A. They solicited our business first.

Q. How. A. By correspondence.

Q. Show the letter where we ever solicited your business? A. I don't know whether we have letters, but Mr. Wells' visits to us and other things.

Q. Didn't you say they solicited your business by letter and through Mr. Wells? A. That was my understanding.

Q. Have you got any letter that shows that? A. No, sir, I have not.

Q. Didn't you get a letter on Sept. 23rd from the W. L. Wells Co.? (Counsel read letter; didn't you get that letter?) A. Yes, sir.

Q. You can't show any letter in which they solicited your business in Sept. 1898? A. No, sir.

Q. Can you show any telegram? A. No, sir.

Q. Your business had been very satisfactory with Wells Co.? A. Yes, sir.

Q. They bought you exactly the kind of cotton you wanted? A. Yes, sir.

Q. Had no complaint to make? A. None.

Q. That continued through the whole dealings? A. Yes, sir.

Q. You wound up the season of '98 and '99 not owing anything? A. According to our books, yes, sir.

Q. Did I understand you to say in your examination in chief that in 1898 Mr. Wells talked to you about Lorey? A. Yes, sir.

Q. Where abouts? A. Gastonia.

Q. Did you own Lorey at that time? A. We were beginning to work on it.

Q. Who owned the ground? A. Mr. Bradley.

Q. When did you buy it? A. Fall of 1898.

Q. In whose name was the title taken? A. Gray and Love.

Q. Wasn't even chartered then? A. No, sir.

Q. The title of the land was not in the corporation? A. Not until later.

Q. You say that in 1899, the fall when Mr. Wells came over, he agreed to take some stock and pay for it in cotton? A. Yes, sir.

Q. When did you first pay out money for Lorey? A. The first entry on our cash book, April 12th, 1900, but we had begun paying out money before that time. We had begun paying out money the first of the year.

74 Q. Who are we? A. John F. Love, treasurer of the Lorey Mills.

Q. Who elected you? A. I was not elected until after the organization.

Q. How much had you paid by Dec. 1900? A. In round figures, $250,000.00.

Q. Where did you get that money from? A. I received it from parties who agreed to take stock in the Lorey Mills.

Q. How much had you paid in at that time? A. $50,000.

Q. When did you commence to pay $50,000.00? A. On the 3rd day of Dec. 1900.

Q. On your own account? A. Yes, sir, I had paid in money before that, but was not shown on the books.

Q. Why not? A. Because the bank account was overdrawn; I paid it through the bank, but I never entered up the credit until Dec. 3rd.

Q. The business of 1898 and 1899 was very satisfactory between you and W. L. Wells Co. A. Yes, sir.

Q. How much had Mr. Gray paid in Dec.? A. Nothing.

—. How much has Mr. Gray paid in the Lorey Mills in all? A. $200.00.

Q. You said in a letter that you and Mr. Gray were largely interested in Lorey and yet he has only paid $200.00 to this good day. When did he pay that in? A. That was paid in the 8th of July, 1901.

Q. I want to ask you that commencing in the fall of 1900 that the Avon and Gastonia Mills didn't begin to fall down notably on your payments to W. L. Wells Co? A. They did not.

Q. Had not you fallen down wonderfully on your payments in 1899? A. We were a little behind once or twice.

Q. Didn't apologize in the most abject terms for your omissions to do what you had promised? A. Yes, sir, I did.

Q. I want to read you some of that correspondence?

First letter written Nov. 8th, 1899, by Wells Co. to John F. Love (p. 114).

Telegram Wells Co. from John F. Love, Nov. 10th, 1899 (p. 114).

Letter Nov. 10th, 1899, W. L. Wells Co. from John F. Love (p. 115).

I read you *a* another letter written by W. L. Wells Co. to you Nov. 13th, 1899, dictated by W. L. W. (p. 115).

Letter written by you addressed to W. L. Wells, Vicksburg, dated Nov. 15th, 1899 (p. 116).

I read you a letter of Dec. 21st, 1899, to John F. Love, from W. L. Wells Co. dictated W. L. W. (p. 117).

I will read you a letter written to W. L. Wells Co. by John F. Love, Dec. 22nd, 1899 (p. 117).

What bonds were these referred to in this letter? A. Town bonds.

75 Q. Did they belong to you? A. No, sir.

Q. Who did they belong to? A. The town of Gastonia.

Q. Town authorize you to use that money. A. Yes, sir, to put the money to their credit in the Gastonia Banking Co.

Q. That was the money that you were going to remit to Wells after you got that town money? A. Yes, sir.

Q. Where did you get that money to buy 800 bales of cotton with? A. I got it out of my business.

Q. In the mean time you owed Wells a great deal of money? A. We owed them some.

Q. How much? A. I don't remember.

Q. Didn't you hear the statement of J. T. Wells that you owed them for Ozark, Avon and Gastonia about $80,000.00; didn't you hear that they had bought for that 800 bales cash? A. Yes, sir.

Q. Didn't remet any to W. L. Wells? A. I did remit. I had promised a remittance and hadn't remitted.

Q. Why did you state first you did remit? Turn to your books and tell when you last remitted to W. L. Wells before Dec. 22nd, 1899? A. I remitted on Nov. 2nd, 1899, $22,720.23, and Dec. 5th, 1899, I remitted $15,203.91.

Q. The two mills still owed $95,000.00? A. On Jan. 11th, 1900, I remitted $17,835.00.

Q. What did you mean by extra interest in that letter? A. I meant any interest incurred by the delay we would pay it.

Q. I will read you a letter of Dec. 22, 1899, from W. L. Wells Co. to John F. Love, dictated W. L. W. (p. 117).

I read you a telegram dated Jan. 7th, 1900, from W. L. Wells Co. (p. 118).

Q. Did you answer that telegram? A. I think I did.

Q. Show the copy of your answer. A. I haven't got it here.

Q. Have you got your letter book here? A. No, sir.

Q. Were you in Gastonia all that time? A. I don't remember whether I was or not, I think I was.

Q. I read you a telegram dated Jan'y. 10th, 1900, to John F. Love, did you answer that? A. I think I did (p. 118).

Q. Can you show any answer to it? A. No, sir.

Q. I will read a letter Jan. 10th, 1900, John F. Love from W. L. Wells.

I read you a letter dated Jan. 16th, 1900, John F. Love, treasurer, Gastonia, N. C., signed W. L. Wells Co., dictated W. L. W. (p. 119).

I read you a letter written by you Jan'y. 17th, 1900, to W. L. Wells, signed John F. Love, vice-president.

A. Yes, sir, that is in reference to another mill—the Ozark Mill.

76 Q. You enclosed a check in that letter for that mill? A. Yes, sir, all we owed him.

Q. When did you buy that cotton? A. Latter part of Dec. I think. I have it entered up here 19th of Dec.

Q. Wasn't that cotton bought 30th of Oct. 1899? A. I don't know; I didn't keep the book of that concern.

Q. Would you recognize the invoice or the copy you kept of it? A. Yes, sir, I would. I didn't have anything to do with the mill; the secretary and treasurer gave me his check and asked me to remit it.

Q. Is that the invoice (presenting invoice to witness)? A. Yes, sir, Oct. 30th is the date.

Q. Was the invoice sent to you? A. No, sir.

Q. You got that invoice? A. It might have been sent to me, but it was sent over to the proper parties.

Q. That is your signature and that is your letter? (Counsel presented letter to witness.)

A. Yes, sir.

Q. In that letter you enclosed check for $13,000.00 and odd for Ozark? A. Here is the check that I received from the Ozark for that amount.

Q. What is the date of that check? A. 19th of Dec.

Q. You didn't send it until *until* Feb. 7th? A. Feb. 8th.

Q. Your letter is dated Feb. 7th; you got a check then for the amount of money and kept the money and you were being dunned and you knew Wells Co. were hard up and you kept that money until Feb. 7th; you have gotten these letters which I have read you in which Wells Co. explained their necessity for money? A. Yes, sir.

Q. You knew they needed their money? A. Yes, sir.

Q. You got that check when? A. 19th of Dec.

Q. On what Bank? A. Gastonia Banking Co.

Q. You didn't remit it to W. L. Wells Co., until Feb. 7th? A. No, sir.

Q. Why did you keep it there? A. I don't remember just now.

Q. Is that the best answer you can give to that question? A. Yes, sir.

Q. I read you a letter written by W. L. Wells Co. to John F. Love, dated Feb. 7th, 1900. That statement of Feb. 7th, 1900, showed $94,351.50, Gastonia Mills; $26,209.82, Avon; $53,311.78 Ozark; $13,633.04. You got that statement? A. Yes, sir (p. 47).

Q. That was correct? A. Yes, sir, unless it be the interest.

Q. Had you been owing this money a long time? A. No, sir, we had been owing them some money for a few months.

77 Q. Were they to carry this cotton for you indefinitely? A. They were going to carry $50,000.00 or $60,000.00.

Q. Only for a short while though; I read you a letter Feb. 9th, 1900, John F. Love, treasurer, signed W. L. Wells Co., dictated J. T. W. (p. 48).

Q. Did you write objection to that interest charged? A. No, sir.

Q. I read you a letter dated Feb. 12th, 1900, to John F. Love, Gastonia, N. C., signed W. L. Wells (p. 121).

I also read you a telegram dated Feb. 14th, 1900, to W. L. Wells from J. F. Love (p. 172).

I read you a telegram dated March 6th, 1900, to John F. Love from W. L. Wells Co. (p. 48).

I read the answer to that telegram, March 6th. 1900, to W. L. Wells from John E. Love (p. 49).

Q. I read you a letter of W. L. Wells Co., to you, dated March 6th, 1900, dictated W. L. W. Did you get that statement in there? A. Yes, sir, I think so (p. 49).

Q. Did you make any objection to it. A. No, sir, none. I remitted the balance separately when I paid them. On Jan. 13th I enclosed the original voucher for $17,835.00. March 3rd I remitted and enclosed original vouchers for $20,575.82 and March 12th $7,308.44.

Q. Turn to the account of Gastonia Mill with W. L. Wells Co. for March 1900; how much did you charge on W. L. Wells Co. account March 14th, 1900? A. I have it down the 12th, on that day I transferred the account from the Gastonia Manufacturing Co. to the Gastonia Banking Co.'s books for convenience (p. 139).

Q. What right had you to open an account with the Banking Co., of Gastonia for the W. L. Wells Co.? A. I didn't have any. I did it as a matter of convenience. I got New York checks from the Gastonia Banking Co. when I remitted.

Q. I want you to add up the amount the Gastonia Mill owed or had purchased in all the total amount of invoices from Oct. 21st, 1899, up to and including Jan. 29th, 1900. A. $57,204.87.

Q. Add up the amount you had remitted for Gastonia Mill up to March 14th in actual cash. A. $30,995.05.

Q. Does that include the $7,000.00? A. No. sir.

Q. You owed the total amount of invoices to Gastonia Mill from Oct. 1899 up to and including March 14th, $57,204.89. A. Yes, sir.

Q. Total payments up to March 14th were 30,995.05. A. I remitted that on March 10th.

Q. Did you charge it up? A. Yes, sir.

Q. I will just show this entry to the jury. How much did you

78 claim to have remitted on March 10th $7,310.44; that left how much due W. L. Wells Co. on March 14th? A. I made a mistake, $18,901.48.

Q. You have got them charged up on March 14th $26,211.82. How can you credit them with more than you remitted? A. I charged them with $26,000.00 and closed their account and transferred the difference to the books of the Gastonia Banking Co.

Q. Had you collected from the Avon Mills and Gastonia Mills? A. They had that to their credit.

Q. You are the Gastonia Banking Co.? A. Yes, sir.

Q. You collected this from the Avon and Gastonia Mills? A. Yes, sir.

Q. And charged it to them that day? A. Yes, sir, on the books of the bank.

Q. Did you notify Avon and Gastonia Mills of that? A. Yes, sir.

Q. You just took the exact balance that was due the W. L. Wells Co. of $18,000.00 and put it to the credit of the W. L. Wells Co. in the Gastonia Banking Co.? A. Yes, sir.

Q. Did you notify W. L. Wells Co. of it? A. No, sir.

Q. Did they know that they had a bank account there? A. No, sir.

Q. You opened it for your own convenience? A. Yes, sir.

Q. Wasn't it just as convenient to let that stand on the books? Had you ever done it before? A. I opened it for the Ozark in Dec.

Q. You did that in the single instance of the Ozark Mills in Dec. 1899? A. Yes, sir.

Q. Did W. L. Wells Co. know anything about it? A. No, sir.

Q. You held that money, as you said, there until Feb. 7th, following? A. Yes, sir.

—. Then the following month, just exactly 37 days afterwards you took some more money and put it in your bank to the credit of W. L. Wells Co.? A. Yes, sir.

Q. How long did you keep that money there? A. I remitted it when it was due in the summer.

Q. You had people to do business in there just like other banks, who deposited money; who checked it out? A. They checked it out.

Q. Who gave any checks on the W. L. Wells Co. in the Gastonia Bank; did they ever give any? A. No, sir.

Q. They didn't know they had an account there? A. No, sir.

Q. Why didn't you send that money to W. L. Wells Co., you knew

79 they needed it? A. Mr. Wells was undecided as to how much stock he would take in the Lorey Mill.

Q. Did that keep you from sending W. L. Wells Co. money to them? A. Yes, sir.

Q. How long were you going to keep it? A. Until the matter was decided.

Q. Who authorized you to do that. A. W. L. Wells.

Q. Why didn't you notify Mr. W. L. Wells that you put that money in the Gastonia Bank? A. Didn't think it was necessary.

Q. Did he ever tell you to do it? A. No, sir.

Q. You just did that on your own free will? A. For our convenience.

Q. After you put that eighteen thousand and odd dollars to the credit of the W. L. Wells Co., as you have stated, didn't you get a statement of account from them on April 2nd, 1900, as follows: John F. Love, treasurer, Gastonia, N. C.; enclosed please find statement of account to April 1st, showing balance due us $53,546.41. Please report on same, etc. Did you get that letter? A. Yes, sir.

Q. Did you object to that statement? A. No, sir.

Q. Interest was charged on that? A. I made a remittance.

Q. Did you remit all that $18,000.00? A. No, sir.

Q. Why didn't you? A. I remitted him a certain amount of balance amounting to $9,714.14.

Q. Why didn't you remit them their money, you had it there in the bank?

Q. The balance was not due; if they were due we were holding them until Mr. Wells had decided about this Lorey stock.

Q. Why didn't you notify the company about that? You didn't open your mouth. A. No, sir.

Q. Just kept that money? A. Yes, sir. I didn't think it was necessary to notify them.

Q. They were dunning you then? A. We were dunning them for their decision.

Q. You didn't resent his dunning you? A. No, sir.

Q. And you had the money there and didn't resent this? A. Yes, sir.

Q. Turn to your account of Avon on March 14th, 1900; how much did Avon owe W. L. Wells Co. for invoices up to March 14th, 1900? A. From Oct. 20th, $86,874.19.

Q. How much had they remitted to W. L. Wells Co. up to March 14th? A. $54,138.23.

Q. That included the remittance of March 6th? A. Yes, sir.

80 Q. How much did that leave them due the W. L. Wells Co.? A. $32,735.96.

Q. How much did you charge them with on the books of the Avon Mills March 14th? A. I charged them with that amount.

Q. Did you remit them that money $32,735.96 March 14th? A. That was treated like the $18,000.00.

Q. You collected this amount from the Avon Mills and put it to this account of W. L. Wells Co. in the Banking Co. of Gastonia. A. Yes, sir, I did.

Q. What is the total of the two? A. $51,637.34.

Q. Was this without W. L. Wells Co. knowledge or consent that you took $51,637.34 of their money and put it in your bank? A. Yes, sir, I did.

Q. They didn't know a thing about it? A. No, sir.

Q. And held it? A. Held it until the decision of the stock.

Q. How much stock was he going to take? A. $50,000.00 or $100,000.00.

Q. Who was going to take it? A. W. L. Wells.

Q. And you took this amount of money, $51,637.34, and held it? A. Yes, sir.

Q. Who authorized you to do that? A. W. L. Wells.

Q. When? A. In our town the summer of 1899.

Q. How did he authorize you? A. By word.

Q. If he authorized you to do that why didn't you notify him that you had done it? A. I was waiting his decision.

Q. Why didn't you notify him that you had done it and was waiting his decision? A. I didn't think it necessary.

Q. Did Wells tell you to hold it there until he decided? A. No, sir, but these balances were not paid and I was holding them until he decided.

Q. He didn't tell you to put that money in the bank. A. No, sir.

Q. You know Mr. Wells is a solvent man? A. I don't know.

Q. Hasn't he carried out everything with you? A. Yes, sir.

Q. Isn't he a man financially able to meet his obligations? A. Yes, sir.

Q. And yet you took this money and put it in your bank for what and why? A. I took it and put it in there for our convenience and waiting the decision about the stock matter.

Q. When did you commence to draw on that? A. On the 6th, of April, 1900, $9,714.22; the 4th of June, $16,000.00; Aug. 2nd, $9,206.30, charged him with $10,000.00 balance, and credited Lorey, which included a bill of Aug. 2nd of $3,283.13 and closed the account.

81 Q. On April 6th you remitted $9,714.22 out of that amount in the bank? A. Yes, sir.

Q. Had you any communication with Mr. Wells announcing his decision? A. No, sir.

Q. What made you change your convenient idea? A. He wrote me he wanted some money and I forwarded him some.

Q. I will read you a letter dated April 13th, 1900, to Mr. John F. Love, Gastonia, N. C., from W. L. Wells, you got that letter? A Yes, sir (p. 121).

Q. On May 7th, they sent you that statement W. L. Wells Co., $44,067.91; please investigate and report on same at your earliest convenience and oblige W. L. Wells Co. by T. J. W. You got that letter? A. Yes, sir, I did (p. 51).

Q. Did you object to that account? A. No, sir.

Q. Did you write to Mr. Wells or to W. L. Wells Co. that you were holding up a lot of money of theirs? A. No, sir.

Q. I will read you a letter dated May 18th, 1900, from W. L. Wells to J. F. Love; you got that letter? A. Yes, sir (p. 122).

Q. When Mr. Wells was in *Gatonia* in May, 1900, did you tell him that you had a lot of money of W. L. Wells Co. in the Gastonia Banking Co.? A. No, sir.

Q. Did you tell him that J. F. Love, as Gastonia Banking Co., had collected from the Avon Mill and Gastonia Mill some money? A. No, sir, I didn't think it was necessary.

Q. Did you think it was necessary to tell them what had become of the money that they were dunning you for? A. I simply transferred it to the bank for convenience. The mill was responsible for it.

Q. Then Avon and Gastonia Mill owed it? A. No, sir.

Q. How could he hold the mills for it if they didn't owe it? A. We couldn't hold it unless he gave permission to hold it.

Q. You were holding that money up there without their *permission*, doing it on your own account? A. Yes, sir.

Q. And you used it? A. Yes, sir.

Q. That is what you kept it there for: To use it? A. You mostly keep money for that.

Q. That is what you made that entry in the Gastonia bank for? A. No, sir, not specially.

Q. Mr. Wells visited Gastonia in May, 1900, as indicated in his letter to you of April 13th? A. Yes sir.

Q. What passed between you all about this subscription to the Lorey? A. We talked the matter over and considered Lorey matters and after staying with us a couple of days and visiting Charlotte he went back home undecided as to how much he would take.

Q. Then you made one remittance shortly after that? A. Yes, sir, I think so. I made two and on the 3rd closed the account.

82 Q. When did you make the first remittance? A. The fourth day of June.

Q. On the fourth day of June how much did you remit? A. $16,000,000.

Q. How much did that leave in the Gastonia bank? A. $25,923.12.

Q. I will read you a letter of June 4th, 1900, to John F. Love, Gastonia, N. C., from W. L. Wells Co., dictated W. L. W. What terms were those referred to in that letter? A. I don't remember (p. 123).

Q. You remitted $16,000.00 and kept $25,000.00 in the Gastonia Bank? A. Yes, sir.

Q. You got that letter I just read you? A. Yes, sir.

Q. I will read you a letter written by you June 19th, 1900, to W. L. Wells, Esq. In other words, after you got this letter of June 4th you kept this $25,000.00 and didn't remit any until June 19th? A. There was one bill of cotton making that $25,000.00 coming in due about that time (p. 123).

Q. The invoice you mean was shipped on the 22nd of June? A. Yes, sir.

Q. Then, notwithstanding this letter of June the 4th you kept this $25,000.00 there and didn't remit but ten of it on June 19th? A. Yes, sir (p. 123).

Q. Why didn't you remit it when you got this letter of June 4th; it was Wells Co. money? A. The bills were not all due, and furthermore we were waiting for that decision in reference to the stock.

Q. When was the last bill? A. 22d of June.

Q. The last bill sent you was the 22d of Jan. prior to that bill of June 22d? A. One bill was 22d of June.

Q. You said that was not included in the $25,000.00? A. That was one of the bills we owed him.

Q. How could you owe him a bill on the 22d of June and June 4th you got this letter? A. We didn't know it on June 4th.

Q. Then you had $25,000.00 of their money in the Gastonia Banking Co. and after getting that letter of June 4th you kept it there and didn't remit it? A. Yes, sir.

Q. Why didn't you? A. Waiting the decision about the stock matter.

Q. You hadn't gotten any decision on June 19th had you? A. No, sir.

Q. When you remitted this $10,000.00? A. No, sir.

Q. Why did you remit the $10,000.00 if you held the $25,000.00 waiting the decision about the stock? A. Because we had a letter from them requesting us to send them some money.

Q. That was June 4th, and you got that letter on June 6th; why

83 didn't you remit them $10,000.00 on June 6th? A. We remitted them $16,000.00 on June 4th.

Q. You have said that after you had remitted that $16,000.00 you had $25,000.00 of W. L. Wells Co's money in your bank; and on June 4th this letter was written to you and you got it in due course of the mails June 6th; why didn't you remit that $10,000.00 that you remitted to them on June 19th on June 6th? Why did you hold that $10,000.00 up that long? A. We didn't claim that it was all due and we were remitting as convenient for us. Mr. Wells said in Oct. that he would carry us for $65,000.00.

Q. How long? A. He didn't state the time.

Q. If you thought, Mr. Love, that you could keep money indefinitely, why did you submit to this letter and not answer it and call his attention that he was going to carry you for $65,000.00; who was to pay? A. Avon and Gastonia Mills.

Q. Had you already credited their accounts with this money you paid into the Gastonia Banking Company? A. Yes, sir.

Q. Had W. L. Wells Co. ever made any arrangement by which their money was to remain in that bank? A. No, sir, I wish to explain right there a matter that was probably misunderstood before the jury. I stated that I transferred that money from the Avon and Gastonia Mills to the Banking Co. for our convenience and it was just to simplify the work, and we had it on the books to the credit of Mr. Wells, of course, so as not show up, we remitted it as we contended it was due. It didn't benefit our bank one particle. We didn't transfer it in order to get the money in our bank. We didn't notify Mr. Wells of it, because we didn't think it was necessary. I want to say that it was no benefit to the Gastonia Banking Co., but simply a transfer of accounts for our convenience in remitting; as the bills came due we remitted and as Mr. Wells wanted money before we remitted he would write us a note and we could attend to it

Q. As I understand, all this money due by the Avon and Gastonia Mills was in the bank of the Gastonia Banking Co.? A. Yes, sir, I think so.

Q. Did it show up prior to the time you opened this account of W. L. Wells Co., on March 14th, on your books of the Gastonia Banking Co., to the credit of these mills? A. Yes, sir.

Q. Then on the same day that you credited Avon and Gastonia Mills, to-wit, March 14th, with money paid to W. L. Wells Co. on the same day, you debited the account of Avon and Gastonia at the Gastonia Banking Co. with these amounts and credited W. L. Wells Co.? A. Yes, sir.

84 Q. What did you go through all that for? A. I was doing it as a matter of convenience.

Q. Will you explain to the jury why it was more convenient to have that account that way? A. The account up to that time had stayed on the two books of Avon and Gastonia Mills. I transferred it to the Gastonia Banking Co. as one account and would remit Mr. Wells on account as shown by checks.

Q. When you wrote, June 19th, remitting that $10,000.00, and you said it is mighty scarce up here, I mean money, I will try and send you some more money, etc. You meant what you said? A. Yes, sir.

Q. You were keeping that $25,000.00 there that Avon and Gastonia had paid on that account? A. Not after that $10,000.00 was paid. I was keeping that $15,000.00.

You were keeping it because money was short?

Q. You never had any further communication with Mr. Wells?

I will read you a letter dated July 13*nd*, 1900, written by W. L. Wells to yourself (p. 58).

Q. That account contained an item of interest of $112.22, balance on account as rendered $21,722.51 to Aug. 1st. You got that account didn't you? A. Yes, sir.

—. You didn't make any objection to it? A. No, sir.

Q. On Aug. 3rd you debited W. L. Wells Co's account, $10,000.00 for stock? A. Yes, sir.

Q. Did you write W. L. Wells Co. about it? —. Yes, sir.

Q. When? A. You find it on the statement of Sept.

Q. Did you write to them that day? A. Yes, sir, you find it on the accounts.

Q. On Aug. 3rd? A. Yes, sir.

Q. Where abouts? A. You find we remitted $9,236.30 that day.

Q. You didn't tell them that you debited that account with $10,000.00? A. I think it is on there.

Q. Is that what you mean on this statement (referring to paper)? A. Yes, sir.

Q. Can you show the jury any entry on that, show $10,000.00 charged to W. L. Wells Co.? Invoice $3,283.18; account $5,923.12; Total, 9,206.30; that is all that you ever sent W. L. Wells Co. A. After receiving letter of July 13th he authorized us that he would take $10,000.00 worth of stock, I deducted $10,000.00, leaving a balance due on account of $5,923.12 plus an invoice of June 22nd $3,283.18, making a total of $9,206.30, for which we enclosed him a check and received back voucher marked "Paid."

Q. It didn't say balance on account, it simply said account? A. Yes, sir.

85 Q. Is that all you ever did in the shape of a notification at that time to W. L. Wells Co.? A. I believe it is.

Q. You had gotten a letter of Mr. W. L. Wells which he had written to you on May 18th, after he visited you in Gastonia, in which he said that he didn't want his subscription mixed up with the concern and not to pay it in that way?

Counsel read letter to witness. Understanding that you made that charge? A. Yes, sir.

Q. Didn't notify him in any other way than you said when you did it? A. No, sir, not at that time.

Q. Now the letter of July 13th that you have spoken of I will read that to you, written by W. L. Wells to John F. Love.

Q. What was that friend he referred to in that letter? A. I don't know. I suppose it was Mr. Willis.

Q. Didn't he tell you it was Mr. Willis? A. At one time he did.

Q. Hadn't he written to you on April 13th stating that he was going to bring my friend along with him? A. He said he was going to bring a friend along with him.

Q. He said my friend? A. I suppose he had more than one friend.

Q. Had he spoken of any one else in connection with this thing except Mr. Willis? A. I think so, when he visited us.

Q. Which visit? A. Summer of 1898.

Q. You got that letter I read you? A. Yes, sir.

Q. In the face of this letter of May 18th, telling you that he used this money in that way, in the face of that letter of July 13th, asking you to remit, you charged this $10,000.00 up? A. Yes, sir.

Q. And didn't notify them in any other way than you have stated? A. I did, later.

Q. At the time you didn't? A. No, sir.

Q. You got this statement of account up to Sept. 1st; I will read you that letter of Aug. 31st, written by W. L. Wells Co. dictated J. T. W. to John F. Love, Treasurer, Gastonia, N. C. On the bottom of this is endorsed in your hand writing $10,000.00 stock Loray, $2,691.67 interest; balance, $12,691.67. We wish to see your Mr. Wells about it when he comes to see us. What did you put that there for? A. Because I claimed the account was balanced off and I wanted to see Mr. Wells about it (p 59).

Q. If you had any authority to make that endorsement what did you want to see Mr. Wells about it for? A. He and I were doing the trading, and I wanted to see him and we would arrange matters.

Q. What did you want to see Mr. Wells about? A. Matters of interest.

86 Q. Didn't you receive statements right along showing interest? A. Yes, sir, but they were all invoices marked paid.

Q. Can you show statement of any sort of account from W. L. Wells Co. receipted in full? A. We remitted always by invoice and the invoices are marked Paid.

Q. I want you to answer this question specifically and directly, can you produce a single statement of account rendered you by W. L. Wells Co. receipted and paid in full? A. I cannot, because we didn't pay that way.

Q. Have you got all the invoices that W. L. Wells Co. sent you during these two years? A. I think so, they have all been produced in evidence.

Q. Mr. Wells visited you in Sept., 1900? A. Yes, sir.

Q. About what time? A. I think, about 25th or 26th.

Q. What was said at that time by you and Mr. Wells about this subscription? A. I spoke to him about his subscription of Lorey Mill and still insisted upon his decision as to the amount he would take and showed him a letter we had from W. C. Craig & Co., offering to take $100,000.00 stock in the Lorey Mill provided we would give them the purchasing agency for the cotton of our mills, and told him that we didn't wish to make a change at that time and if he couldn't succeed in getting his friend to take the $50,000.00 stock that we proposed, if he would take his $50,000, we would prefer continuing our business with him. After talking over the matter he told me that he thought he would take it and would let me know in a few days. He had never refused up to this time to take some stock but he was undecided as to the amount and we insisted on knowing definitely what we could depend on. He went home and Oct. 4th he wrote us a letter which you have in evidence saying that he would take $50,000.00 stock agreed upon.

Q. Now, that is all that passed between you about the stock at that time? A. I can't say that that is all that he said; that is the essence of it.

Q. Turn to the stock book of Lorey Mills and show the stock account of W. L. Wells; what does that show? A. W. L. Wells, 1900, Aug. 2nd by cash, page 8, on the cash book, 10,000.00.

Q. What is this entry here, April 24th, 1900, $50,000.00 stock? A. That stock was issued $50,000.00.

Q. That was stock issued to who? A. W. L. Wells.

Q. 1900? A. That ought to be 1901.

Q. It appears on this book April 24th, 1900? A. Yes, sir, that should be according to the journal, 1901.

Q. Whose entry is that? A. J. W. Ware, bookkeeper.

Q. Have you got any stock subscription? A. No, sir.

87 Q. Your stock book or stock account of W. L. Wells shows that on April 24th, 1900, you have charged him up with $50,000.00 of stock? A. Yes, sir.

Q. You have related the substance that passed between you and Mr. Wells? A. Yes, sir.

Q. Where did that conversation take place? A. We were together a couple of days, I think this particular conversation took place in the office of our store.

Q. Who was present? A. W. L. Wells and myself.

Q. It took place the night before he left? A. Yes, sir.

Q. Up to that time it had been tacitly understood that he was going ahead and purchase for the Avon and Gastonia Mills as he had done? A. Yes, sir.

Q. Then you took up the subject of the Lorey that night? A. Yes, sir.

Q. Didn't you tell Mr. Wells there, after showing him this letter of W. C. Craig & Co., or telling him about it, in which they offered to take $100,000.00 worth of stock if you would give them the buying of the Lorey cotton in connection with the other mills; that it was tacitly understood that he was going to buy for Avon and Gastonia Mills as usual? A. No, sir, I did not mean that. I only meant that he was to buy until we gave him orders not to buy.

Q. That was the understanding until you had that conversation that night? A. Yes, sir.

Q. Did you ever intimate a doubt that he was to continue to buy for the Avon and Gastonia Mills? A. No, sir.

Q. I will ask you this question, if there and then you didn't tell Mr. Wells that you had $940,000.00 bona fide subscription to the capital stock of the Lorey Mills? A. No, sir.

Q. Didn't Mr. Wells say to you that he couldn't take over $25,000.00 on his account, if that was so, to-wit, that you had $940,000.00 of bona fide subscription of the stock that he could get his friend, Mr. Willis, to take the other $25,000.00 and he would see about that when he went home and would write you and that $50,000.00 was to be paid in when the $940,000.00 was paid in, and that it was not to be paid until Jan. 1st and when the mill was built and organized? A. No, sir, he did not say that.

Q. Didn't he say he didn't want to get his friend into this concern unless it was an assured success and that they didn't want to pay this $50,000.00 until the $940,000.00 had been paid? A. No, sir.

Q. How much stock in point of fact was ever subscribed to the Lorey corporation in the North Carolina Charter? A. I didn't have any subscription book.

88 Q. How much did you estimate had been promised to it? A. From six hundred to eight hundred thousand dollars.

Q. How much in point of fact was paid in? A. $393,400.00.

Q. Didn't you represent generally to the public that $900,000.00 had been paid in? A. No, sir.

Q. Subscribed? A. No, sir.

Q. I will show you an advertisement, did you ever see that before? A. No, sir.

Q. Do you know of Abbott & Stephens? A. Yes, sir.

Q. I will read you a lettter dated April 21st, 1900, written by Abbott & Stephens to you; did you get that letter? A. Yes, sir, I think I did (p. 124).

Q. I will ask you to examine this letter of April 23rd; Counsel read this letter. Is that the advertisement referred to in that letter? A. I didn't see it in the paper. Mr. Abbott gave me a copy and I suppose that is the same.

Q. Is it your best impression that this is the same thing? A. I can't say, I think it is.

(Advertisement in the Textile Excelsior Saturday, May 12th, 1900, read in evidence by plaintiffs' counsel) (p. 124).

Q. Then you authorized Abbott & Stephens to advertise that all the stock had been taken except $100,000.00? A. I told them that I would give them the selling of $100,000.00.

Q. You said that advertisement was correct? A. The advertisement they sent me was something on that basis and I told them that they could go ahead and sell $100,000.00.

Q. After looking at that advertisement you wrote that letter? A. I think so.

Q. Why do you say you think? A. Because I don't know whether that is the advertisement or not. I can't swear to that. I don't know whether that is the copy they sent me or not.

Q. Didn't you tell Mr. W. L. Wells the same thing when he was there in Sept. except you had $940,000.00 subscription? A. No, sir.

Q. Didn't you tell him how much was subscribed? A. I don't think it was mentioned.

Q. He didn't ask that question? A. Not that I remember of now.

Q. Did you tell him that you had taken $10,000.00 of W. L. Wells Co. and paid for stock? A. It was not mentioned at that time.

Q. And you didn't mention it? A. No, sir.

Q. Why did you say in your endorsement on that letter that you

89 wanted to see Mr. Wells? A. I wanted to see him about the adjustment of the interest.

Q. Did you say anything about the interest? A. No, because it was undecided about what amount of stock he would take.

Q. You didn't mention that $10,000.00 credit on Aug. 3rd? A. No, sir, I had already notified the house about it.

Q. You never did notify them except this endorsement on this letter of Aug. 31st? A. No, sir, I don't think I did.

Q. I will read you a copy of a telegram you sent Sept. 12th, 1900, to W. L. Wells Co. (p. 125).

Q. I will read you a letter dated Oct. 1st, 1900, John F. Love treasurer to W. L. Wells (p. 126).

Q. I will read you a letter of Oct. 5th, 1900, written by W. L. Wells to John F. Love, Esq., Gastonia, N. C. (p. 126).

Q. You got that letter? A. Yes, sir.

Q. I will read you a letter written Oct. 9th, 1900, to W. L. Wells, signed John F. Love, treasurer (p. 127).

Q. You wrote that letter? A. Yes, sir.

Q. I will read you a letter Oct. 20th, 1900, written by W. L. Wells to John F. Love (p. 127).

Q. I will read you a letter that you wrote on Oct. 22nd, 1900, as treasurer to W. L. Wells (p. 128).

Q. I will read you a letter of Oct. 20th to John F. Love from W. L. Wells Co. dictated by J. T. W. You got that letter? A. Yes, sir (p. 127).

Q. I will read you a telegram of Oct. 25th, sent by W. L. Wells Co. to John F. Love (p. 129).

Q. I will read your answer Oct. 26th, to W. L. Wells Co., "Buy it." Signed, John F. Love (p. 129).

Q. I will read you a letter of Oct. 31st to John F. Love written by W. L. Wells Co., dictated J. T. W. (p. 130).

Q. I will read you a letter of Nov. 3rd written by John F. Love to W. L. Wells (p. 131).

Q. I will read you a telegram Nov. 12th, 1900, to John F. Love, sent by W. L. Wells Co. (p. 131).

I will read you your answer to that telegram dated Nov. 12th, 1900 (p. 131).

I will read a letter of Nov. 13th, 1900, John F. Love, treasurer, from W. L. Wells Co., dictated W. L. W.

I will read you a letter of Nov. 17th, 1900, to W. L. Wells, signed John F. Love, treasurer (p. 132).

Q. Had you perfected your arrangements? A. I had at that time.

Q. With whom? A. Loan Exchange Bank of Columbia, S. C.

Q. Why didn't you state that to W. L. Wells Co.? You had

90 been doing business with the National Surety Co.? A. We had perfected better arrangements with the Loan Exchange Bank of Columbia.

Q. How much did you borrow? A. $100,000.00 on our note.

Q. When did you get it? A. Nov. or Dec. of that year.

Q. If you had perfected your arrangements at that time why did you not have the money? A. We were waiting for it.

Q. I will read you a letter of Nov. 19th, 1900, W. L. Wells, Esq., and signed by J. F. Love.

Q. I will read you a letter of Nov. 21st, written by W. L. Wells to John F. Love. You got that letter? A. Yes, sir (p. 133).

Q. I will read you a letter of Dec. 18th, 1900, written by W. L. Wells Co., dictated by W. L. W. Did you get that letter? A. Yes, sir (p. 134).

Q. Did you make any answer to it about the money matters? A. I don't remember.

Q. Don't you know in fact that you did not? A. I don't remember.

Q. Have you got any copy of your letter here showing that you did? A. No, sir.

Letter of Dec. 20th to John F. Love, treasurer, written by W. L. Wells Co., dictated W. L. W. Read to witness (p. 135).

I will read you a letter written Dec. 22nd, 1900, by John F. Love to W. L. Wells (p. 136).

I will read you a letter of Dec. 22nd, 1900, written by W. L. Wells to Mr. John F. Love.

I will read you a letter written on Jan. 2nd, 1901, by W. L. Wells Co. to John F. Love, dictated W. L. W. (p. 137).

You got that letter? A. Yes, sir.

Q. Did you answer it? A. Not to my knowledge.

Q. I read you a telegram Jan. 31st, 1901, to John F. Love from W. L. Wells Co. Did you answer that telegram? A. I think I answered in a letter of Feb. 22nd (p. 138).

Q. Did you answer it to W. L. Wells Co.? A. No, sir.

Q. The telegram was from them? A. Yes, sir.

I will read you a letter of Feb. 22nd, 1901, written by you to W. L. Wells, Esq.

Q. What is that house you speak of in that letter? A. My dwelling.

Q. In the letter of Oct. 4th, 1900, which Mr. Wells wrote to you he says I am going to make a change in my present firm after this season and don't want my arrangement with you and the Lorey Mills known to the house, so in writing about this, please mark your letter "personal." That letter that *that* was written on Feb. 22nd, was marked personal; all these letters that you wrote about the

91 Lorey Mill were marked personal? A. I think all letters after Oct. 4th, 1900, were marked "personal." We didn't know any one else in the firm and we did all our business with W. L. Wells.

I will read you a telegram sent by Mr. Wells to J. F. Love, Feb. 4th, 1901 (p. 138).

I will read your letter of Feb. 5th, to Mr. W. L. Wells, Vicksburg (p. 138).

Q. When was the Lorey Co. organized under the North Carolina Corporation? A. On July 8th, 1901.

Q. Who was elected president? A. George A. Gray.

Q. What date was that? A. July 8th, 1901, at the first meeting of the Directors.

Q. Who were the directors? A. John F. Love, George A. Gray, Frost Torrence and W. A. Rankin.

Q. Who was elected vice-president? A. Didn't elect any that day.

Q. Did you notify Mr. Wells of that organization? A. I think so.

Q. What stock holders were present? A. There is a long list of them.

Q. Is Mr. Wells' name anywhere on that list? A. Yes, sir.

Q. Did you notify him of it? A. I think I did.

Q. Why do you answer that you think, don't you know? A. I prepared a notice to all those stockholders and I think I mailed one to all of them.

Q. Did you mail a notice to Mr. Wells? A. I think I did.

Q. Can't you give a better answer than that? A. No, sir.

Q. Was he present? A. No, sir.

Q. You represented him personally? A. I represented him by proxy.

Q. Where is the proxy? A. I haven't got it.

Q. You have had it? A. No, sir.

Q. How could you issue stock before it was organized? A. I don't know, but we issued it.

Q. Your stock book charged up to W. L. Wells shows April 24th, 1900; you say that is an error, it ought to be 1901? A. Yes, sir.

Q. You hadn't organized until July 8th, 1901; how could you issue stock before you organized? Who issued it? A. Geo. A. Grey and John F. Love.

Q. How did you sign it? A. George A. Gray, president, and John F. Love, treasurer. That was the understanding of the stockholders who paid in their money.

Q. As I understand you, you and Mr. Gray, on the 24th of April,

92 1901, assumed to issue stock before that company organized? A. Yes, sir.

Q. And Mr. Gray didn't have but $200.00 in it? A. No, sir.

Q. When did Mr. Gray pay in that $200.00? A. In July.

Q. When was it charged to him? A. Never was charged to him.

Q. Turn to Lorey stock account of Geo. A. Gray. A. July 8th, 1901, $200.00. The same day he is charged with stock $200.00.

Q. Then Mr. Gray was not a stockholder on April, 1901? A. The stock we held was held jointly, but I afterwards took it.

Q. Why didn't you charge it to him? A. Because it hadn't been issued to him.

Q. According to the books of the Company, as you have introduced here. Mr. Gray, on April 24th, 1901, and before the company was organized, assumed to act as a stockholder as president, and you as secretary, and issued that stock? A. Yes, sir.

Q. And you assumed to act as proxy for Mr. Wells when you didn't have one? A. Yes, sir; I did.

Q. Have you got the books of the Gastonia Banking Co. here? A. Yes, sir.

Q. Turn to the account of Avon Mills with W. L. Wells Co., Nov. 19th, 1900. How much did you charge W. L. Wells Co. up with that day? A. $3,283.48 and $23,967.70.

Q. How much cash did you remit to W. L. Wells Co. that day? A. I have it here, W. L. Wells Co. on account, $27,251.18.

Q. You charged them with that? A. Yes, sir.

Q. How much cash did you remit to them? A. I change that on Nov. 9th, 1900, we owed Mr. Wells for two invoices.

Q. I am not talking about that. How much cash did you remit? A. $27,251.18 from Avon Mills, which we credited to him.

Q. How much cash did you send them? A. We didn't remit them any on that day.

Q. What did you do with the money? A. Placed it to his credit in the Gastonia Banking Co.

Q. You took on Nov. 9th, 1900, $27,251.18, and credited to W. L. Wells Co. at the Gastonia Banking Co. Then that would show to Avon Mills stockholders that you had paid W. L. Wells Co. A. Yes, sir.

Q. Did you notify W. L. Wells Co. that you had done this? A. No, sir; the bill was not due for 30 days. We credited this, as I explained before, for *convience* on the books of the Gastonia Banking

93 Co. and remitted to him on Nov. 20th, about 19 days before it was due, $25,000.00 on account.

Q. You charged W. L. Wells on the books of the Avon Mills as so much cash. A. Yes, sir.

Q. And made a deposit slip in the bank? A. Yes, sir.

Q. And you credited up Avon Co. with that amount? A. I credited Wells Co. with that amount and charged it to Avon Mill as cash.

Q. Didn't say a word to W. L. Wells Co. about it? A. No, sir.

Q. What did you pay it into the bank before it was due for; you said these bills were not due the W. L. Wells Co. A. As we explained, we did it for our convenience knowing that when the bills came due we could get a New York check from the Banking Co. and remit Mr. Wells, and we remitted on Nov. 20th a check for $25,000.00 that was not due until Dec. 9th; and on Dec. the 3d a check for the balance of $15,357.59 both of which are in evidence.

Q. The usual method of banking is when a customer has a deposit in a bank he draws his own checks? A. Yes, sir.

Q. Then for your convenience you opened an unusual account by which you were to check on W. L. Wells Co's money? A. I didn't check it, I just opened that account in our bank as a matter of convenience and whenever the amount came due I went to the bank and got them to give me a New York exchange and forwarded it to them.

Q. Who made any terms with Gastonia Banking Co. for W. L. Wells? A. No one. I assumed to place that at his credit. That was entirely an act of my own.

Q. And you were the bank? A. Yes, sir.

Q. And kept the money? A. Yes, sir.

Q. Did you ever do any other customer that way? A. No, sir. *sir.*

Q. Did you ever hear of a bank opening up an account with a customer without his knowledge and taking it out as that bank saw fit? A. No, sir, as I said, Mr. Wells knew nothing about it. It was simply a matter of our convenience, our bank and our mills having the same office and we always got New York checks for Mr. Wells and when the bills came due we could get the checks and forward them to Mr. Wells.

Q. Was W. L. Wells Co. the only people to whom you all remitted by New York exchange? A. No, sir, not the only people. They were the only people we were buying cotton from.

Q. Suppose you had not made this entry and transferred this amount to W. L. Wells Co., as you say, the orderly method would

94 have been for Avon to give a check on the Gastonia Banking Co., when it was due? A. Yes, sir.

Q. For Gastonia Mill to have done the same thing and then you would have made out New York exchanges for W. L. Wells Co. and charged it to Avon and charged it to Gastonia? A. Yes, sir.

Q. And then you would not have had any other new account on your book at all? A. No, sir.

Q. Then you just opened up a new account as a matter of convenience when it was not necessary. A. According to your method we would have taken a check on Dec. 9th from Avon and Gastonia and got a New York check, but instead of doing this we placed this to Mr. Wells' credit in the bank and remitted him checks before they were due as he claimed he was short of money.

Q. You talked about these not being due, didn't you hear the correspondence I read here in which you were telling W. L. Wells Co. that you had arranged for money and that you were going to remit promptly? A. I recall that correspondence. I also recall that all balances are due 30 days from date.

Q. Is that so? A. That is the way I understand it.

Q You charged up on Dec. 3rd to that account of W. L. Wells Co. $40,000.00 of stock of W. L. Wells? A. Yes, sir.

Q. Did you notify W. L. Wells that you had done that? A. No, sir.

Q. Didn't you ever notify W. L. Wells Co. that you had done it? A. No, sir.

—. Why was it if you had authority to do it that you delayed until Feb. 2nd, 1901 when you had been dunned not only by letter but by telegram? A. For the simple fact that the bills were not due.

Q. Did you charge them on Dec. 3rd for $40,000.00? A. Yes, sir, but the bills were not due until the first of Jan.

Q. What time in Jan. were they due? A. About the first.

Q. They were all dated in Nov.? Q. Yes, sir.

Q. The latest one is the 28th of Nov. and the earliest one is Nov. 15th? A. Yes, sir.

Q. How much did you owe on Nov. 15th? A. I received one bill for $2,637.84; that was due Dec. 15th.

Q. You didn't remit? A. No, sir.

Q. You didn't write to them on Dec. that you had paid their account up in full? A. No, sir.

Q. You had collected it and charged it to them on the books of the mills and had the money there in the Gastonia Banking Co? A. Yes, sir.

Q. You said just now that you paid some that were not due? A. Yes, sir.

95 Q. Why did you do that? A. Because it was convenient to do it. I paid invoices of Nov. 9th on that other remittance.

Q. All would have been due the first of Jan.? A. Yes, sir.

Q. I call your attention to that letter again written on Jan. 2nd, 1901, "By the way, what about paying for our cotton, etc." You didn't answer that letter? A. I don't think I did (p. 137).

Q. Why didn't you notify them of that credit you paid Dec. 3*th*? A. As we agreed to pay these payments by the first of Jan. I thought of course it was not necessary.

Q. They were dunning you? A. I wrote him on Feb. 2nd.

Q. 30 days afterwards? A. Yes, sir.

Q. And you didn't write then until you got a dun by telegram? A. I don't remember.

Q. Didn't you get that telegram? A. I think I did (p. 138).

Q. Why do you say you don't remember? A. I don't recall the telegram.

(Counsel read telegram.)

Q. People are getting pretty anxious when they dun you by a telegram. A. Yes, sir, I think so.

Q. You submitted to the dun of Jan. 2nd, and it took a telegraphic dun before you said anything about this payment of Dec. 3rd? A. Yes, sir, that is so.

Q. I will read you your letter of Feb. 2nd. Why didn't you say in that letter I paid your stock on Dec. 3rd? A. The bills were not due until the first of Jan. and we agreed that they should not be paid until Jan. 1st (p. 62).

Q. But you had gotten a dun on Jan. 2nd, from the house? A. Yes, sir.

Q. Why didn't you say in this letter I paid your stock on Jan. 3rd? A. I thought he knew it.

Q. Did he tell you to pay it out of the cotton of W. L. Wells Co.? A. That was my understanding.

Q. Where did he say that? A. In a conversation with me.

Q. Whereabouts? A. Different times in Gastonia.

Q. I thought you said you gave the substance of the conversation on the night that it took place in Gastonia in Sept. 1900, in the office of Gray & Love? A. Yes, sir.

Q. You didn't say anything in that about Mr. Wells telling you to pay out of this firm's cotton? A. It was talked over at different times.

Q. That was the final understanding that night; you were rounding up the whole thing before he left? That was the last thing that was said that you have narrated? A. He said he thought

96 he would take the stocks and wanted the payments to come in about the 1st of Jan. and that he would let me know about it in a few days.

Q. That is all he said? A. He talked a good deal and that is among the things he said.

Q. That is the sudstance of what he said. A. I think so.

Q. There is nothing in that about paying for this stock out of the proceeds of the cotton of W. L. Wells Co.? A. We were talking about the purchasing of the cotton and the stock together and it was my understanding that it would come out of the cotton. That is what he told me.

Q. Why did you omit that in your first conversation? A. I didn't intend to.

Q. That you swear to in your answer is a part of the contract and you failed to state it here? A. I don't remember I meant to state it.

Q. What did W. L. Wells say in reference to that at that time about paying? A. We spoke of payinug the stock in, at that time 10 per cent per month it beginning 1st of Jan. previous; and he talked about taking stock and he wanted to know how to pay it and he wanted to know if I could let it come in with the payments of cotton about the 1st of Jan. I think you will find that also in one of his letters.

Q. What letter? A. I don't remember. Perhaps the letter of Oct. 4th.

(Counsel read letter of Oct. 4th.)

Q. Did you agree to the manner of payment of stock? A. Yes, sir.

Q. That was before it was agreed to be taken? A. He had already paid in $10,000.00.

Q. What were you speaking about that for? A. He was talking about taking more.

Q. How did you suppose that you and Mr. Wells were going to keep this away from Mr. Butterworth and Mr. John T. Wells if it was to be paid out of the firm's cotton as you say? A. We didn't know how we would arrange it, he left it entirely with me.

Q. You wanted Mr. Wells to buy the cotton for the new mill individually? A. Yes, sir.

Q. In your answer you say that afterwards, to-wit, in Jan. 1901, according to the terms of the contract, you paid out on account of said cotton, etc.,——? A. Yes, sir.

Q. What do you mean by that? A. We meant that the Jan. payments were turned over to the Lorey as on our books entered up on Dec. 3rd.

97 Q. According to your statement $10,000.00 had been paid Aug. 3rd, 1901? A. Yes, sir.

Q. And $40,000.00 had been paid Dec. 3rd, 1901? A. The Avon and Gastonia Mills anticipated payments in order to assist the Lorey Mill.

Q. Hadn't it been paid to the Lorey? A. Yes, sir.

Q. What do you mean by this telegram in your answer? A. I meant that the Jan. payments went to the Lorey.

Q. I don't understand you. A. $10,000.00 had been paid on Aug. 3rd, and $40,000.00 on Dec. 3rd, 1900, that was paid to the Lorey.

Q. What payment did you make in Jan.? A. This pay- was entered on our book on Dec. 3rd.

Q. Are the books of the Lorey credited with the payment of Aug. 10th? A. Yes, sir.

—. When? A. Aug. 2nd, 1900.

Q. That was Lorey's money? A. It was turned over to Lorey and paid out.

Q. Then on Dec. 3rd, 1900, Lorey was credited with $40,000.00 paid it? A. Yes, sir.

Q. How could you pay any more money to Lorey; they were the only two accounts charged to Mr. Wells. What do you mean by this paragraph in your answer? A. We meant the two payments of Aug. 2nd and Dec. 3rd.

Q. Is that paragraph true that I have just read in your answer? A. Except $688.08.

Q. I want you to read the paragraph yourself to the jury.

(Witness read paragraph to jury.)

Q. That is your signature to the oath? A. Yes, sir.

—. Please explain to the jury how if you had paid in Dec. 3rd, 1900, the balance of $40,000.00 of the Lorey Mill, making a total of $50,000.00, how could you pay out any more in January? A. I didn't pay any more in January.

—. Then that paragraph of your answer is not true? A. Not in that sense, it is not.

Q. Mr. Wells visited you at Gastonia on July 31st, 1901? A. I think about that time.

Q. You had some conversation there with him? A. Yes, sir, every time he visited me.

Q. Didn't you tell him then that you had only had $343,00 stock paid in and subscribed to Lorey? A. I don't remember.

Q. Did you or did you not? A. I don't think I did.

Q. Didn't you in that conversation tell him that this enterprise had fallen down and that you would have to reorganize it? A. We talked about the matter.

98 Q. Didn't you tell him that? A. Not in those words.

Q. Didn't you tell him you were reorganizing it? A. I think so.

Q. That you had a meeting on July 10th for that purpose? A. Yes, sir.

Q. Didn't you tell him you were going to get him $50,000.00 worth of preferred stock? A. No, sir.

Q. Didn't he tell you he would not take common stock? A. He said he would take half common stock and half preferred.

Q. Didn't he insist upon having preferred stock in the Maine corporation at that conversation in July, 1901? A. He may have at that time.

Q. And didn't you promise to get it for him? A. I told him I would if I could.

Q. Didn't you show him a notice at that meeting of the stock holders of the old corporation? A. I don't remember, I was not well at that time.

Q. I will show you that notice.

(Counsel presented paper to witness.)

Q. Do you recognize it? A. Yes, sir, it is a notice of a meeting of the stock holders of the Lorey Mill (p. 154).

Q. I will ask you if in that conversation that you had with Mr. W. L. Wells in Gastonia on July 21st, if you didn't reach into your drawer and pull out this notice and hand it to him? A. I don't remember.

Q. Did you, or did you not? A. I think I did.

Q. Didn't you say you didn't send him this notice or one to Mr. Lineberger, or that you would bust the thing up if you could not carry out your views or get Mr. Wells preferred stock; did you or did you not say this? A. I don't think I did.

Q. Didn't you at that time say to Mr. Wells that you had purposely withheld this notice and didn't send it to him and also did not notify Mr. Lineberger and that your purpose was to have an organization of the Maine concern carried out according to your understanding and wishes, and, if it was not, that you would then bust up the organization? A. No, sir, I did not.

Q. Why did you withhold it? A. I don't remember.

Q. Didn't Mr. Wells deny to you that he was a stock holder? A. I don't think he did.

Q. Didn't he repudiate that he was a stockholder? A. He talked both ways. He said he would take the stock and he said that he would not.

Q. Didn't he tell you that you hadn't complied to the conditions upon which he had subscribed and that he repudiated? A. I don't think he did.

Q. Did he or did he not? A. He did not.

Q. I will ask you if Mr. Wells didn't leave there with the understanding that he would come back in August and get $50,000.00 worth of preferred stock? A. I couldn't make him any promise.

Q. Didn't you tell Mr. Wells you would do it if you could? A. Yes, sir.

Q. Didn't he come back on the 16th of Aug.? A. About that time.

Q. It was the day of the stock holders' meeting? A. Yes, sir, the 16th.

Q. Didn't you tell him then that you couldn't get him the $50,000.00 stock until after the organization? A I think I did.

Q. Didn't you tell Mr. *Well* then that you wanted him to go into that meeting? A. Yes, sir.

Q. And he declined? A. Yes, sir.

Q. Then the meeting was held? A. Yes, sir.

Q. Didn't you come out and tell Mr. Wells that everything was alright and that you would have $50,000.00 worth of preferred stock for him when he came back from New York? A. No, sir, I told Mr. Wells that he had been very kind to us and that I would do everything I could for him, but I could make him no promise.

Q. When Mr. Wells came back the latter part of Aug. you then told him you couldn't get this stock? A. I think I did.

Q. Didn't you tell him that you would get it for him in a week or ten days or thought you could? A. I told him I thought I could get a part.

Q. Didn't you tell him you could get it all? A. No, sir, I did not.

Q. Mr. Wells came back to Charlotte? A. I think so.

Q. And waited about two weeks? A. Yes, sir.

Q. And went back to see you? A. Yes, sir, two or three times.

Q. Didn't he come to Gastonia to see you on Friday the 13th of Sept. 1901? A. I don't remember the exact date, he was down there several times.

Q. Didn't you then tell him that you couldn't get the $50,000.00 worth of stock and didn't Mr. Wells tell you for the first time that if you would get $25,000.00 of preferred for his friend that he didn't want him to lose anything, that he would take $25,000.00 of common stock for his part and that the two mills were to pay up the balance in cash. A. I told him I would do what I could for him.

Q. Didn't you tell him also in that conversation that you were going to do that as soon as you got the money from the Lorey

100 organization and that you would send him that balance in cash and the $25,000.00 of preferred and the $25,000.00 of common? A. I made no positive promise, I told him I would if I could.

Q. Didn't you promise in any event you would send that balance in cash? A. No, sir, I did not.

Q. I want to repeat that over to you again; didn't Mr. Wells in that conversation on Sept. 13th, 1901, and didn't you agree at that time that you would send $25,000.00 in common stock and $25,000.00 in preferred stock and pay the balance out of the funds of the new Lorey organization and that Mr. Wells was to give his individual check to the concern of W. L. Wells Co. A. Mr. Wells had shown me a couple of drafts for $25,000.00. I suppose they were to pay for the stock.

Q. Didn't he tell you he would turn these drafts over to you when you did that and that he would give his check of $50,000.00 to W. L. Wells Co.? A. No, sir, not to my knowledge.

Q. You deny it? A. Yes, sir.

Q. Do you recollect my visiting you about the 31st of Oct. 1901? A. Yes, sir.

Q. Do you recollect the conversation I had with you in the office of Gastonia Banking Co. in Gastonia when I called your attention to the fact that you had failed to send that $25,000.00 of common stock and that $25,000.00 of preferred stock and that balance in cash, whatever it was, I don't remember the exact amount? A. I don't remember that.

Q. And that you hadn't done as you agreed and you admitted that you hadn't? A. I do not.

Q. I will ask you if I didn't say to you then, Mr. Love, you have collected that balance in cash for the Lorey Mill, why didn't you send that, and you said, My necessities were so great I have used it? Didn't you tell me that? A. I think I did.

Q. I will ask you, Mr. Love, if I didn't say to you, these gentlemen, W. L. Wells Co., have no desire to press you, and if you will put this thing in shape and give the notes of the two mills of $5,000.00 a month with 6 per cent interest with $100,000.00 of common stock as collateral, that I thought that I could get them to agree to do it and would telegraph them; and why didn't you tell me to telegraph? A. You made a proposition, as I remember, that if we would give our notes for the whole amount and this $100,000.00 stock as collateral, and that you thought that they would accept it.

Q. Didn't you agree to it? A. No, sir.

Q. Didn't I go to the telegraph office and subsequently come back with a telegram saying if you would do that and give $150,000.00 of common stock and get Mr. Gray to endorse it and

101 Mr. Love and the directors that that would be satisfactory and didn't you tell me then that you would show it to Mr. Gray and that you thought it would be done? A. I told you I would see Mr. Gray and let you know about it.

Q. Didn't you tell me you thought it would be done? A. No, sir.

Q. Didn't you tell me that Mr. Gray declined to endorse it, and thought that the Avon and Gastonia Mills were good enough for the amount? A. I told you we declined to do it because if we signed these notes that would lay us liable to take this Lorey stock and that we declined to do that. I had told you, also Mr. Wells, that we were figuring with Mr. Friere to sell the mill and if we did so we would be able to get Mr. Wells this money for his stock; but that if it failed to go through and we signed these notes we would be responsible for it and in that case we declined to do it.

Q. Didn't you, after seeing Mr. Gray, put your refusal on the ground that Mr. Gray declined to do it and thought that the notes of the mills were good enough? A. I declined it on account of accepting this $50,000.00 stock of Mr. Wells.

Q. Didn't I tell you there was nothing left but a suit and that I would have to come to Charlotte and sue in the United States Court? A. Yes, sir.

Q. And didn't you for the first time say anything about this stock that is in dispute here? A. I think it was the first time, but I had had it in my mind all the time.

RE-DIRECT EXAMINATION.

Q. On the 14th day of March, 1900, you can state how much the Avon Mill had on general deposit in the Gastonia Banking Co. A. $47,538.13.

Q. Does that appear on the books of the Gastonia Banking Co.? A. Yes, sir.

Q. How much did the Gastonia Manufacturing Co. have on general deposit in the Gastonia Bank? A. $17,061.79.

Q. Whose check were these deposits subject to? A. Check of John F. Love, treasurer of Gastonia and Avon Mills.

Q. Didn't any one else have the authority to draw that money out of the Gastonia Banking Co.? A. None whatever.

Q. Are these the deposit slips you used in transferring that money from these two cotton mills to W. L. Wells Co. account? A. Yes, sir.

(Deposit slips offered in evidence by defendant) (pages 139, 140 & 141).

Q. In whose handwriting is the deposit of $32,735.96 on the Avon account? A. Mine.

102 Q. Was it made on the date that deposit slip appears dated? A. 14th of March, 1900.

Q. In whose hand writing is this deposit slip in reference to Gastonia Manufacturing Co.? A. Bookkeeper, Mr. Jas. A. Page.

Q. What date was that made on? A. March 14th, 1900.

Q. Where is Mr. Page? A. Right here.

(Deposit slips marked Exhibit A. 2 and P. 2 offered in evidence by defendant.)

Q. In transferring these accounts from the cotton mills to the Gastonia Banking Co. did you assume to act as the agent of W. L. Wells Co.? A. No, sir.

Q. Were the deposits in your bank decreased or increased by making that transfer? A. Was not changed a cent.

Q. Did you personally or representing your bank gain any pecuniary or other advantage by making that transfer? A. None whatever.

Q. Then why did you do it? A. I transferred them in order to keep the two accounts together so that when I remitted Mr. Wells for these invoices I would just go to the Gastonia Banking Co. and get the New York drafts. If I had remitted without doing that, it would have caused my getting a check from each mill. It was simply a matter of no importance, but saved me a little work.

Q. How did the Wells Co. render these accounts against you for the Gastonia Manufacturing Co. and Avon Mills? A. Rendered to each mill separately.

Q. Did they consolidate them? A. The statements were together.

Q. How did you ordinarily remit to them? A. Together.

Q. Did you send them a separate check for the account of each mill? A. No, sir, I always remitted one check.

Q. Why did you do that? A. To save trouble.

Q. How did you save trouble? A. By taking these amounts and crediting them up to the Gastonia Banking Co. and getting one check for the amount. It always saved bookkeeping.

Q. If you had not transferred these two accounts to these two mills to Gastonia Banking Co., would you have remitted to W. L. Wells any quicker than you did? A. No, sir.

Q. I believe that Mr. Wells visited you on the 10th of May, 1900? A. Yes, sir.

Q. Did he make any demand on you for any money while he was in Gastonia? A. No, sir.

103 Q. Did he say anything to you about what the mills owed him then. A. No, sir.

Q. Look at that letter dated May 8th, 1900, and read it. Did you say anything to Mr. Wells about fixing that account up when he was there? A. No, sir.

Q. Had you written anything to him about it? A. No, sir.

Q. Do you know why he happened to make that statement in that letter? A. No, sir.

Q. Turn to your book in reference to that entry of the 10th or 14th and explain and show to the jury how that entry was made? A. Our custom in posting our books when we posted the cash book we went until we got to the bottom of the page; in posting these two entries on the 10th and 14th of March you find on the cash book page 123 we paid out on the 10th of March W. L. Wells, invoices nine, ten, eleven, $7,308.44. On the 14th of March as shown you on the cash book we charged W. L. Wells Co. with $18,901.38 that being transferred to the Wells Co. credit in the Gastonia Banking Co.

Q. In whose hand writing are these entries made? A. Mr. Ware's.

Q. Where is he? A. In the court room.

Q. Will you state how much stock Mr. Wells agreed to take when he was at your place in the fall of 1899? A. $10,000.00.

Q. State whether or not that was the original $10,000.00 he referred to in his letter of July 13th, 1900? A. It was.

Q. Did Mr. Wells know the conditions under which that stock was to be paid for? A. Yes, sir.

(Letter dated Oct. 7th, 1899, addressed to W. L. Wells, signed by John F. Love, treasurer, offered in evidence by defendant) (p. 141).

Letter dated Oct. 28th, 1899, to W. L. Wells signed by John F. Love, treasurer, offered in evidence by defendant (p. 142).

Q. Did you write that letter? A. Yes, sir.

Q. Did you ever receive any reply to that letter? A. I think so.

Q. Do you have any recollection whether he specifically replied to this letter? A. Don't think he did. I am not sure about it.

Q. In May, 1900, when Mr. Wells visited you, how much of his stock subscription was in arrears? A. All.

Q. How much was due? A. 10 per cent from Jan. 1st.

Q. Five months? A. 50 per cent.

104 Q. How much would that be? A. $50,000.00.

Q. Say anything about paying that? A. Not at that time.

Q. In reference to the invoices you sent the Wells Co. on the 31st of July, 1900, enclosing them a check for $9,006.30 with that credit on it; did W. L. Wells at any time after that up to Aug., 1901, question the correctness of that statement? A. No, sir.

Q. With reference to the letter that you wrote Mr. W. L. Wells on the 2nd day of Feb. 1901, is this the only reply you ever got to it?

(Counsel read telegram from W. L. Wells.)

A. Yes, sir.

Q. Did you answer that telegram? A. Yes, sir.

Q. From the time that telegram was sent you up to the time Mr. Wells visited you in Aug. 1900, in Gastonia, did he ever write you or telegraph you or say anything to you in any way denying the correctness of that charge of $40,000.00? A. He did not.

Q. You were asked this morning in reference to the issueing of stock on the 24th or April, 1900; I want to ask you if when the directors of that company were elected or when the stockholders met on the 8th of July, 1901, what action they took with reference to what you as secretary and treasurer and Mr. Gray as president had done for the company? A. They ratified what we had done.

(Minutes of the meeting of the stock holders of the Lorey Mill offered in evidence by defendant, pages 2 to 26 inclusive) (p. 142 to 152).

Q. Turn to your stock book and explain the item or the date there April 24th, 1900, when the stock was issued? A. The ledger shows here on April 24th above it is 1900. The 1900 I think was put there some time before this entry was made.

Q. Who made the entry? A. Mr. Ware.

Q. Have you got any way of showing when the entry ought to have been made? A. It was made from the journal.

Q. Look at your journal. A. On page 2 of the journal, 1901, April 24th, posted to page 202 on the ledger April 2nd. 1900, stock $50,000.00, W. L. Wells.

Q. Will you please explain how it was Messrs. Abbott & Stephens had anything to do with the Lorey stock? A. We had a communication from them along about that time asking us to give them an option on some of our mill stock, that they had some friends north that they thought would take some of it. We did give them an option on four of our mills. In talking to Mr. Abbott in reference to the Lorey Mill I told him that we had been talking to a

105 party and we had placed $900,000.00 and we could give him an option on $100,000.00 for 30 days.

Q. Read the last clause of this letter introduced in evidence.

(Witness read letter.)

A. He sent us the advertisement and we gave him the option and didn't say anything at all about it and he knew the situation of affairs.

Q. You told him the status of affairs? A. Yes, sir.

Q. He says there the advertisement is in a different way? A. Yes, sir.

Q. That is the way you approved it? A. Yes, sir. When we told Mr. Abbott we said we had in sight $900,000.00, times were good and we were expecting to place it all, but failed to do it, and he failed to place any stock for us, also.

Q. I read you this telegram on Sept. 12th, 1900, from you to W. L. Wells Co. prior to the sending of that telegram. I will ask you if you had received this letter? A. Yes, sir, I think it came in about the same time (p. 125).

Q. What is the date of that letter? A. Sept. 10th, from W. C. Craig & Co., Vicksburg, Miss.

Letter offered in evidence by defendant (p. 171).

Q. Did the writing of this letter from W. C. Craig & Co. have anything to do with your sending that telegram to Wells Co.? A. Yes, sir, we wanted to see Mr. Wells and know what he was going to do, because we wanted to get the matter settled. He had been talking to us for about a year and had never decided what stock he would take.

Q. Your telegram was dated Sept. 12th? A. Yes, sir.

Q. In reference to a letter written by you to Wells Co., on Oct. 1st, 1900, making an order for cotton, will you tell why you ordered cotton from them at that time? A. We were waiting on him to give us a decision and were short of cotton.

Q. Did you have any place to get it from then? A. No, sir, we had been buying all of our cotton from Mr. Wells.

Q. Could you get the kind of cotton you were using here? A. No, sir, we had to get it from Mississippi.

Letter dated Dec. 22nd, 1900 from W. L. Wells Co. to John F. Love, read in evidence by defendant (p. 136 & 137).

Q. That was in reference to stock in another mill that Mr. Craigh had taken? A. Yes, sir.

Q. What about the nuts to crack? A. That was just a little piece of irony.

Q. What mill was he referring to, the million and a half mill? A. That was the Lorey Mill. The other $10,000.00 stock was a mill in South Carolina.

106 Telegram of Feb. 4th, 1901, to John F. Love from W. L. Wells read in evidence by defendant (p. 138).

Q. You answered that telegram? A. Yes, sir.
Q. Didn't Mr. Wells ever reply to that letter? A. No, sir.
Q. The letter as introduced in evidence this morning? A. Yes, sir.
Q. Turn and look at Lorey Mill book and state when the W. L. Wells Co. was credited with stock subscription of $50,000.00? A. Aug. 2nd, 10,000.00.
Q. Look at that paper and state what it is? A. It is the deposit ticket on the Lorey Mill of W. L. Wells of $10,000.00; it is in my hand writing, it was made out July 31st, 1900.

(Deposit ticket offered in evidence by defendant and marked Exhibit R. 2) (p. 140).

In transferring it it is on our book Aug. 2nd.
Q. Look at that paper and state what it is? A. Deposit ticket of W. L. Wells Lorey Mill, Dec. 3rd. I made that out myself, entered it on cash receipt of Lorey Mill.

(This deposit ticket offered in evidence by defendant and marked Exhibit Q. 2) (p. 141).

Q. In whose hand writing are both these entries made on the Lorey books? A. J. White Ware.
Q. Look at the accounts of the Gastonia Manufacturing Co. and Avon Mills and state how much these two mills owed W. L. Wells Co. on the 31st of July, 1900, from their books and your bank account? A. Our books are square.
Q. How were they squared? A. This entry of March 14th had paid it off.
Q. Then they owed nothing? A. No, sir, nothing at all.
Q. How much did the Bank Co. owe W. L. Wells Co. on that day? A. Nothing at all.
Q. How was it squared? A. On July 13th we forwarded them a check for $5,923.12 and credited the Lorey $10,000.00 as shown by deposit ticket.
Q. We owed Wells Co. $15,923.12, we forwarded them a check for $5,923.12.
Q. State what that paper is. A. Deposit ticket dated Dec. 3rd.
Q. In whose hand writing is it? A. Mine.

(Deposit ticket offered in evidence by defendant and marked Exhibit S. 2) (p. 140).

107 Q. How much stock did you subscribe for in the Lorey Mill? A. No particular amount.

Q. How much did you pay for? A. $100,000.00.

Q. In the reorganization, what kind of stock did you get in the Maine corporation? A. Common stock.

Q. Did you own any preferred stock? A. No, sir.

Q. What kind of stock did all the stockholders of the old Lorey Mill who had paid in their subscription get? A. Common stock.

Q. Did you pay in your subscription of $100,000.00? A. Yes, sir.

Charter of Lorey Mills offered in evidence by defendant.

L. L. Jenkins Introduced by Defendant.

Q. Are you acquainted with Mr. John F. Love? A. Yes, sir.

Q. Where do you live? A. Gastonia; I have known him since 1883.

Q. Have you lived in the same town with him since that time? A. Yes, sir, we lived in Charlotte together.

Q. How long have you been living in Gastonia with him? A. Since 1888.

Q. Do you know his general character? A. Yes, sir, it is good.

B. G. Bradley Introduced by Defendant.

Q. Where do you live? A. Gastonia.

Q. How long have you lived there? A. 60 years.

Q. Do you know Mr. John F. Love? A. Yes, sir. I have known him for 15 or 20 years.

Q. How long have you lived in the same town with him? A. 15 or 20 years.

Q. What office do you hold in that town? A. None.

Q. Have you held any in that town? A. I was a justice of the peace up to two years ago.

Q. Do you know Mr. Love's character? A. Yes, sir, it is good.

J. K. Dixon Introduced by Defendant.

Q. Where do you live? A. Gastonia.

Q. How long have you lived there? A. Two years, but I lived there four years ten years ago.

108 Q. Do you know Mr. John F. Love? A. Yes, sir.
Q. How long have you known him? A. 20 years.
Q. Do you know his general character? A. Yes, sir.
Q. What is it? A. Good.

E. N. LINEBERGER INTRODUCED BY DEFENDANT.

Q. Where do you live? A. Gastonia.
Q. How long have you lived there? A. Since 1888.
Q. Do you know Mr. John F. Love? A. Yes, sir, I have known him since 1888.
Q. How near have you lived to him? A. Close neighbors.
Q. Do you know his general character? A. Yes, sir, it is good.

W. T. RANKIN INTRODUCED BY DEFENDANT.

Q. Where do you live? A. Gastonia.
Q. How long have you lived there? A. Ten years.
Q. How long have you known Mr. John F. Love? A. All my life. Known him intimately for ten years.
Q. Do you know his general character? A. Yes, sir, it is good.

J. E. PAGE INTRODUCED BY DEFENDANT.

Q. Where do you live? A. Gastonia.
Q. How long have you lived there? A. From '75 to '81 and from '83 to the present time.
Q. Have you known Mr. John F. Love? A. Yes, sir, ever since he has been there.
Q. How long has he been there? A. 12 or 15 years.
Q. Do you know his general character? A. Yes, sir, it is good.

DR. G. H. DETWILDER INTRODUCED BY DEFENDANT.

Q. You lived in Gastonia? A. Yes, sir, 1901, 1900 and 1899, three years.
Q. During that time did you know Mr. Love? A. Yes, I was in Gastonia, three years and a half.
Q. How long have you known him? A. Only the time sir.
Q. How far did you live from him? A. I was his next neighbor.
Q. You are a minister of the gospel, Methodist church? A. Yes, sir.

109 Q. Do you know his general character? A. Yes, sir, it is good.

W. H. LEWIS INTRODUCED BY DEFENDANT.

Q. Where do you live? A. Gastonia.
Q. How long have you lived these? A. 14 years.
Q. Have you known Mr. Love in that time? A. Yes, sir.
Q. What position have you occupied? A. I have been a lawyer and mayor of the town.
Q. Are you mayor now? A. No, sir.
Q. Do you know the general character of Mr. Love? A. Yes, sir, it is good.

CROSS-EXAMINATION.

—. You don't know his character any better having been mayor? A. No, sir, except he was one of the aldermen during that time.

W. R. CRAIG INTRODUCED BY DEFENDANT.

Q. You live in the State of Mississippi? A. Yes, sir, Vicksburg.
Q. What is your busines threr? A. Cotton buyer.
Q. Are you connected with any firm? A. Yes, sir, I am a member of the firm of W. C. Craig & Co.
Q. You belong to the firm that wrote the letter that was read here? A. Yes, sir.
Q. Have you heard of the business that was talked about here and written about as to the value of a certain agency for buying cotton as to what it is worth? A. Yes, sir.
Q. What is that business worth?

(Objection by plaintiff; overruled; testimony admitted; exceptions.)

A. I should say it would be worth from $25,000.00 to $40,000.00 a year.
Q. You mean for all these other mills? A. Yes, sir, for all four cotton mills.
Q. Do you know who made the contracts and did the principle part of the business of the firm of Wells & Co.? A. I know them simply as competitors on the market; W. L. Wells does the buying principally.
Q. That is W. L. Wells that was sworn here yesterday? A. Yes, sir.
Q. Do you know who the other two members of the firm are? A. Mr. Butterworth and Mr. J. T. Wells, I know them both.

110 Q. What business are they engaged in? A. J. T. Wells is a member of the firm of Lucket & Wells and Mr. Butterworth is doing business under the name of Geo. Butterworth & Co. I have had no direct business with him, but I have understood that he is in business for himself this year.

CROSS-EXAMINATION.

Q. You are a competitor of W. L. Wells Co.? A. Yes, sir, we are in the same line of business.

Q. You stated just now you were a *competor*? A. Yes, sir.

Q. You live in Vicksburg, Miss.? A. Yes, sir.

Q. When did you leavr there? A. Last Friday night.

Q. Where did you come to? A. Gastonia, N. C.

Q. Who met you at the depot? A. I didn't get off at the depot; I got off at the crossing of the narrow guage and main line.

Q. Who met you? A No one.

Q. Where did you go to? A. Hotel.

Q. See Mr. Love? A. No, sir, not until after I went to the hotel.

Q. Did he know you were coming? A. Yes, sir.

Q. He wrote you to come? A. No, sir, I telegraphed Mr. Love on Thursday is my recollection, to know if he would be at home Saturday afternoon; he wired back that he would be at home.

Q. You told at home that you were going to New York and from there to Europe? A. I don't know that I did.

Q. Didn't you tell me when I met you at the hotel last Monday that you were going East and from there to Europe? You have been here ever since? A. Yes, sir.

Q. Been consulting with counsel for defendant? A. They have asked me questions.

Q. Haven't you been to their office? A. Yes, sir.

Q. Been there with Mr. Love? A. Yes, sir.

Q. Consulting about this case? A. I have been there in their office.

Q. Purely voluntarily? A. It was at the request of Mr. Love.

Q. You need not have gone? A. There was no law compelling me to go.

Q. Have you ever been subpœnaed here? A. No, sir.

Q. Have you been staying here day after day since last Monday waiting to testify in this case? A. I did that because I had promised to do so. It was not through any malice, but simply because Mr. Love requested me to stay over here. His counsel asked

111 me what I knew in regard to this case and in regard to that letter and they requested that I stay here and if they wanted to put me on the stand I told them I would be glad to stay if I could serve them in any way whatever.

Q. Do you know about W. L. Wells Co. business; have you ever been in their office? A. I stated that Mr. Wells was the man that transacted the business of W. L. Wells Co. All I know is that Mr. Wells bought the cotton and that he had general charge of the business in Vicksburg.

Q. What do you mean by general charge? A. He bought the cotton on the market; that is the principal thing a cotton buyer has to do in Vicksburg.

Q. That is all you know? A. Yes, sir.

Q. You don't know anything about the contracts or business of the concern other than that? A. That is about all that I could possibly know.

Q. Mr. Wells is reputed to be one of the best judges of cotton in the country? A. I think he is good.

Q. Is it an unusual thing for a man in a firm who is a first class judge of cotton to buy the cotton for the firm? A. No, sir, it is usually the case.

Re-Direct Examination.

Q. Did you know anything about the litigation before you came to Gastonia? A. No, sir, the only thing I knew was a notice of a telegram dated Charlotte, N. C., to the New Orleans Picayune.

Q. When did you know that? A. This paper reached Vicksburg Wednesday or Thursday afternoon and the next morning after this paper was received in Vicksburg and I telegraphed Mr. Love if he would be in Gastonia on Saturday afternoon, and my reason for doing so was that at the time I had seen Mr. Love he told me at that time that his arrangement was made with Mr. Wells and it was entirely satisfactory and he didn't care to make any change, but that if he ever did make any change he would be glad to see us.

Q. Did you come here to see anything about the law case?

A. I had no idea of being mixed up with a law suit until after I arrived at Gastonia.

Defendant Closes.

When the evidence was offered by the plaintiff in error as to transactions between W. L. Wells and John F. Love, representing the plaintiff in error, tending to prove the agreement on the part of W. L. Wells that a part of the purchase money due by the plaintiff

112 in error for the cotton, should be turned over to the corporation known as the Loray Mills, in payment of the subscription to the stock of the said mills, which it was claimed that W. L. Wells had made, counsel for the defendant in error objected to all such testimony, and His Honor stated that he would admit the same subject to the requirement that it should thereafter be shown in the course of the trial that the said W. L. Wells had authority from the defendant in error to make the said agreement, or that the same had been ratified by the defendant in error.

At the close of the testimony offered by the plaintiff in error, counsel for the defendant in error thereupon stated that before introducing testimony in reply, they would move the court that all the evidence which had been offered as to the transactions between W. L. Wells and John F. Love, in regard to the agreement that part of the purchase money of the cotton should be applied to the payment of the alleged subscription made by W. L. Wells to the stock of the Loray Mills, be stricken out, for that the evidence of the plaintiff in error had closed, and plaintiff in error had failed to show any authority on the part of W. L. Wells to agree that any part of the purchase money due for the cotton should be applied to the payment of his subscription to stock in the Loray Mills, or had failed to show any ratification of the same by the defendant in error.

His Honor thereupon stated that he would instruct the jury that the plaintiff in error had failed to offer any evidence from which the jury would be warranted in finding that W. L. Wells had authority to bind the W. L. Wells Company by any agreement to apply any part of the purchase money to the payment of his stock, and had failed to offer any evidence from which the jury would be warranted in finding that the W. L. Wells Company had ratified any such act, and that upon the pleadings and the evidence in the case he would instruct the jury to find the issue in favor of the defendant in error and render a verdict for the amount claimed in the complaint.

CERTIFICATE OF INCORPORATION OF "THE LORAY MILLS" BY CYRUS THOMPSON, SECRETARY OF STATE.

STATE OF NORTH CAROLINA,
Department of State.

To all to whom these presents shall come—Greeting:

Know ye, that it appears from the certificate of the clerk of the Superior Court of Gaston County, that the following named persons:

113 Jno. F. Love, Geo. A. Gray, Frost Torrence, J. M. Sloan and W. T. Rankin, heretofore on the 16th day of February, 1900, signed and filed articles of agreement for the formation of a private corporation before said clerk, and copy of said articles of agreement, duly certified by said clerk under the seal of said court, have been filed and recorded in this office, as prescribed in chapter 318 of the acts of 1893.

Now, therefore, under the power and authority vested in me by said chapter 318 of said acts of 1893, I do hereby declare the persons signing said articles of agreement duly incorporated under the name and style of "The Loray Mills," for the period of thirty years from and after the 19th day of February, 1900, for the purposes set forth in said articles of agreement, with all the powers, rights and liabilities conferred and imposed by law on such corporations.

Witness my hand and the great seal of the State of North Carolina, at office in the city of Raleigh, this the 19th day of February, in the 124th year of our independence, and in the year of our Lord one thousand nine hundred.

CYRUS THOMPSON,
Secretary of State.

[THE GREAT SEAL OF THE STATE OF NORTH CAROLINA.]

NORTH CAROLINA, }
Gaston County. }

I, C. C. Cornwell, clerk of the Superior Court of Gaston county, certify that the foregoing and attached is a true and accurate copy of the articles of agreement and letters patent of the Loray Mills as they appear upon record and on file in this office.

Witness my hand and official seal this, the 28th day of June, 1901.

C. C. CORNWELL,
Clerk Superior Court, Gaston County.

(Seal of the Superior Court of Gaston Co.)

114 **LETTER NOV. 8, 1899.**

Vicksburg, Miss., November 8th, 1899.

Mr. John F. Love, Treas.,
Gastonia, N. C.

Dear Sir:

From your various letters of recent date we get the idea that you are inclined to buy your cotton this and next month. In this we have come to the conclusion that your decision is a wise one.

From the best information we can gather about the crop, it is undoubtedly very much short of the past two, and everything looks to us like higher prices are bound to obtain later on. In short, we believe that the earlier you buy your cotton the cheaper you will get it, and we are inclined to go right in and buy it. What say you? To do this, of course, we will have to look to you for some considerable help in the way of ready money, and while East, wouldn't it be a good idea to arrange for this?

The banks in this section are unusually heavily loaded owing to the very rapid gathering of the cotton crop, and they are all loaded to the guards with interior cotton buyers, and are not disposed to make any time loans. Of course, as far as our capacity goes, count on that, but it is a matter only of fifty to sixty thousand dollars, which at present prices of cotton won't go very far towards getting your supplies.

Yours very truly,
W. L. WELLS CO.

TELEGRAM NOV. 10, 1899.

W. L. W.

Gastonia, N. C., Nov. 10, '99.

W. L. Wells Co.,
Vicksburg, Miss.

Letter received; buy cotton quick as possible; write occasionally.

JOHN F. LOVE, Treas.

115 **LETTER NOV. 10, 1899.**

Gastonia, N. C., November 10th, 1899.

The W. L. Wells Co.,
Vicksburg, Miss.

Gentlemen:

Your long looked for letters to hand this morning, and in reply we immediately wired you to buy cotton, and let us hear from you occasionally, and send you the confirmation of the same.

It has been our opinion for some days that we would see better prices; our goods are steadily advancing and the demand is enormous.

Buy our cotton as soon as possible, and we will make arrangements about money, and think we can get all we want at any time. Buy cotton, and send us invoices and letters telling us what you are doing and expect to do, and we will make our arrangements accordingly.

We remain, in haste, awaiting your further favors.

Yours very truly,
JOHN F. LOVE, Treasurer.

LETTER NOV. 13, 1899.

Vicksburg, Miss., November 13th, 1899.

Mr. John F. Love, Treasurer,
Gastonia, N. C.

Dear Sir:

We have yours of the 10th. It looks to-day like our delay in buying your cotton has been your good fortune. At all events it would appear that you have lost nothing, and likely otherwise. However, we don't think it a good idea to bet on the market going down much, nor at the same time would we advise rushing and buying too fast, but rather a happy medium between the two extremes.

Now, don't let us annoy you about money matters, but you don't seem to get quite the idea we wish to convey. It is this: Up to date we have shipped you in round figures $65,000.00 of cotton, which is about out capacity, without borrowing from our banks, and this we don't care to do for reasons given in our last. Now, what we want you to do is to arrange for money so we will not have to carry you for exceeding, say, sixty to seventy thousand dollars.

116 If you are to buy all your cotton in the next thirty to sixty days, it means an outlay of some $350,000.00, or say, practically $300,000 more than we are able to carry you for, hence we must ask that you either arrange to remit us as we buy, or let us draw at sight. We want to be very explicit about these matters, as it never hurts anybody to have a perfect understanding, but to the contrary, in our opinion, it is the only right way to do business.

Yours very truly,

W. L. WELLS CO.

(W. L. W.)

LETTER NOV. 15, 1900.

Gastonia, N. C., November 15th, 1900.

W. L. Wells, Esq.,
Vicksburg, Miss.

Dear Sir:

For fear that you will lose your good opinion of us and get in a snap, we send you some money to-day, and trust it will run you for a few days, and we will try and send you some more next week. We have made no arrangements for any money yet as we were expecting you to get it until your recent letter, and we have placed our *twon* bonds and we hope to have that money very soon, $65,000.00, on deposit for some time, and our sheriff has delayed in his collections, and instead of having a good deposit to his credit is overdrawn several thousand dollars to-day, which will be in in a few weeks, and between these two parties we may not have to borrow but a small amount for some time. From your letter last night we fear that you are not buying any cotton for us for fear that we won't send you any money, and we will say that we have several friends wanting to lend us money, and we don't anticipate any trouble to get whatever money we may need for legitimate purposes at all times.

You may hold up the Ozark *ctton* some, as we see now that we will not be able to get our machinery before the first of next year, and will not be running before the 1st of February *on* March, 1900. Push in some more for Avon as soon as possible, and also Gastonia, and we hope you will profit by the recent declines.

We accepted some handsome orders this morning, and hope to be all right for next year.

In haste.

Yours very truly,

JOHN F. LOVE.

117 **LETTER DECEMBER 21, 1899.**

Vicksburg, Miss., Dec. 21st, 1899.

Mr. John F. Love, Treasurer,
Gastonia, N. C.

Dear Sir:

We enclose herewith invoices of 314 bales, various marks. This is one crop of cotton we bought in the country, and you will find the 221 bales OPI-E magnificent full 1⅛ to 3-16. The 34 bales OVE-A and IVE-S are nice grades, but not quite so full in staple, while the 39 bales UNI-T, BET-A and RIN-D are rather "ratty" all round, though we got them off in price to make up for a good deal. You understand that in buying a crop from a country planter, there is no way of getting part of it—it is all or nothing, and the bulk of this was too good to miss on account of a little tag end which you can work in to advantage. We thought best to separate in marks, so you would know better how to use it in mixing.

There are several nice crops offering which could be had cheap, but our hands are tied until you send us some money, which we hope will come along by the first, at latest.

Yours very truly,
W. L. WELLS CO.

W. L. W.

LETTER DEC. 22, 1899.

Gastonia, N. C., December 22nd, 1899.

W. L. Wells, Esq.,
Vicksburg, Miss.

Dear Sir:

I was never put in such an awkward position in my life, and never have I been so diabolically disappointed.

I am ashamed of myself, and have treated you badly indeed, and am determined to right my wrongs in some way, and that soon. In the early part of the season I was offered all the money I wanted at 4½ per cent., and as we had a lot of money to be coming in, I would not take it. Cotton went up, money got tight, and I have never seen such a demand for money in this section, and our ex-

118 pected money has not arrived. I wrote you last week, and I thought I had the matter adjusted, but here I am disappointed, and am disappointing you. I took our bonds, $65,000.00, to Winston on Wednesday of this week to deliver them and get the money, and to be disappointed again. Parties wanted the bonds and are ready to take them, but the printer has made a mistake in getting them up, and now we must have them reprinted, and it will mean another week to do that. I am pushing them all it is possible, and will make the delivery as soon as possible.

I enclose you a clipping from our paper from the sheriff, and you can see how he is getting on. All our banks are loaded to the brim and are not loaning anything, and we have been expecting better things and have bought some 800 bales cotton here and put it in the warehouse. Now you can see our position and our disappointment, and if you can get your bank to carry you for another week or two, we will commence and pay you off prompt, and pay you the extra interest if any is incurred.

We are very much worried over this matter, and very sorry that we have disappointed you.

We remain, Yours truly,
JOHN F. LOVE, Treas.

TELEGRAM JAN'Y 7, 1900.

Jany. 7, 1900.

John F. Love, Treas.,
Gastonia, N. C.

Prudish Prurient last week.

W. L. WELLS CO.

Translation: "When can we expect a remittance? We are disappointed in not receiving a remittance last week."

TELEGRAM JAN'Y 10, 1900.

Jany. 10th, 1900.

John F. Love, Treas,
Gastonia, N. C.

Rivalry Civility Rive to-morrow Sinews for us to know exactly what we can depend upon. Rose.

W. L. WELLS CO.

Translation: "Have received no reply to our telegram of 7th inst.

119 Pleast give it attention. Reply by wires so that the message will reach us to-morrow. It is important for us to know exactly what we can depend upon. Particulars by mail."

LETTER JAN'Y 10, 1900.

Vicksburg, Miss., Jany. 10th, 1900.

Mr. John F. Love, Treasurer,
Gastonia, N. C.

Dear Mr. Love:

We wired you Sunday night asking when we could expect a remittance, and not hearing from you, we wire you again to-night, and hope to have your reply to-morrow. Based on your letter 22nd December, the writer assured our bank that you would be sure to remit by the 10th at latest, and acting on this we have gone ahead and bought some nice lots for you, which we have to pay for, and you can readily understand how embarrassing it is to us, and how very disappointing to the bank.

We hope nothing has occurred to delay matters again, and

Yours truly,

W. L. WELLS.

LETTER JAN'Y 16, 1900.

Vicksburg, Miss., Jan'y. 16th, 1900.

Mr. John F. Love, Treasurer,
Gastonia, N. C.

Dear Sir:

Uncle Sam's bank examiner has been due for some time, and we have been holding some bills of lading in order that our account would not show up so unfavorably, but this has been gone through with, and we have passed muster. We now herewith enclose bills of lading for:

241 bales OPI-E	6 bales RIN-D
4 bales BET-A	21 bales OVE-R
13 bales IVE-S	29 bales UNI-T
25 bales TOP	77 bales ROL-E
100 bales ONY-X	55 bales UNO-L
	161 bales SOU-P

All for account of Avon.

120 50 bales CAP-E 100 bales NAT-I
107 bales JAC-K

Account of the Gastonia Cotton Mfg. Co.

We bought the following lots in the country, and had to take gin weights, which were guaranteed. On arrival please have carefully re-weighed and give us the numbers (?), as the party from whom we bought claims he has made a mistake in rendering the weights which we invoiced to you:

241	OPI-E	13	IVE-S
21	OVE-R	29	UNI-T

Your prompt attention to this matter will greatly oblige.

Yours very truly,

W. L. WELLS CO.

W. L. W.

LETTER JAN'Y 17, 1900.

Vicksburg, Miss., Jan'y 17th, 1900.

Mr. John F. Love,
Gastonia, N. C.

Dear Sir:

Some time since we asked you to hold up on the Ozark cotton for a while, since which we have not heard from you on this matter.

Such cotton as you need for the Ozark is becoming very scarce, and while there is a small accumulation on the market, when this is gone it will be practically exhausted.

We thought best to advise you about this, that you may act accordingly, and as you think best.

Yours very truly,

W. L. WELLS CO.

121 **COPY OF LETTER PAGE 669, BOOK, NO. 3.**

Vicksburg, Miss., Feb'y 12th, 1900.

Mr. John F. Love,
Gastonia. N. C.

Dear Sir:

Yours of the 7th received, and, supplementing the firm's answer, I beg to say that we are going to have considerable trouble to get the cotton you want for the Ozark Mills. The full style inch cotton, such as we have been shipping to Gastonia, is very scarce, and every lot of the kind put out is snapped up by exporters, who at last have realized the shortness of the crop and are genuinely alarmed. Such cotton will cost anywhere from 9¼ to 9½ cents, and I expect I will have to go to New Orleans to buy it, though there is a little lot here of about 400 bales, which I think I can buy for 9½, possibly 9¼ landed. There is also a lot of 200 bales very, very handsome, strict good middling to middling fair, beautiful, smooth, well handled, 1¼, which I think can be bought for 11¾ landed, and if these prices don't give you heart failure, please wire me promptly on receipt of this if you think it advisable to buy them, and I will do what I can towards it. If possible, will shade the prices, but if the market keeps strong as it is to-day, there is little hope of this. These prices contemplate prompt payment, say not exceeding 15 days, and, if possible, we would like to have the authority to draw with bills of lading attached. We shall expect to hear from you by wire promptly Wednesday morning. Also let us know if you want us to buy any more cotton for Gastonia and Avon mills.

Yours very truly,
W. L. WELLS.

LETTER APRIL 13, 1900.

Vicksburg, Miss., April 13th, 1900.

Mr. John F. Love,
Gastonia, N. C.

My Dear Sir:

I have yours of the 26th ult., and have been talking with my friend about investing in the Loray, but thus far without any very definite conclusion. He has about half-way promised to run over

122 there and look things over, and we have set 10th May to come. At all events, I will be over there at that time, and will then decide what I will do about the amount of stock I will take.

As to buying your cotton, I see no reason why I can't do this, whether I come or not; in fact, it looks to me that I could serve *all* your interest better by remaining here. You don't need a local cotton buyer, but one to buy the cotton you have to buy away from home. However, these matters can be talked over when I come on.

With kind regards to your family and Mr. Gray, I am,

Yours truly,

W. L. WELLS.

LETTER MAY 18, 1900.

Vicksburg, Miss., May 18th, 1900.

Mr. John F. Love,
Gastonia.

Dear Mr. Love:

I did not reach home until yesterday evening, and found my wife quite ill, but she is better this morning. Have not had an opportunity to talk with my friend yet, but will some time soon.

Regarding the balance due us on last season's purchases I had rather not mix that up with anything else, and would thank you to remit to cover this as soon as possible, as it would facilitate me very much.

Please give this your prompt attention, and oblige,

Yours truly,

W. L. WELLS.

LETTER JUNE 4, 1900.

Vicksburg, Miss., June 4th, 1900.

Mr. John F. Love,
Gastonia, N. C.

Dear Sir:

Since yours of the 23rd ultimo to the writer we have heard nothing from you, and are very much disappointed at not receiving the remittance according to promise. You certainly do not appreciate

123 our position in this matter. Do you know that since your letters and telegrams to us of about the 10th of November last, saying for us to "go ahead and buy your cotton, and that you would arrange for the money to pay for it," that we have invoiced all your cotton on a cash basis, and can show by our books that prices charged you were ⅛ to ¼c. less than your neighbors paid us for the same cotton at the same time with sight draft?—bill of lading attached. Furthermore, every dollar we have carried you for has cost us 8 per cent. interest from the day we bought the cotton, whereas we have only charged you six per cent. Pardon us for a little display of impatience, as you must know that it is not without cause. We know your intentions are good, but you know what is said of "good intentions."

May we ask that you remit us in full covering invoices and interest to date by return mail, and greatly oblige,

Yours very truly,

W. L. WELLS CO.

W. L. W.

LETTER JUNE 19, 1900.

Gastonia, N. C., June 19th, 1900.

W. L. Wells, Esq.,
Vicksburg, Miss.

My Dear Sir:

We enclose you our check for $10,000.00 on account, and we trust it will keep you out of the poor house, and that you have enough bread to last a few weeks yet. It is mighty scarce up here (I mean money). I will try and send you some more money soon, if I am not too short. I don't want to have to borrow any.

How about you and your friends in the Loray? We shall be glad to hear from you in regard to it, and don't want you to disappoint us.

We beg to remain, with best wishes, and all well,

Yours very truly,

JOHN F. LOVE.

124 **LETTER APRIL 21, 1900.**

April 21, 1900.

Mr. John F. Love,
Gastonia, N. C.

Dear Sir :

We have been approached by the manager of the Textile Excelsior for an advertisement in their special ediction, issued during the Cotton Spinners' Convention here on the 10th of May, copies of which shall be sent not only to their subscribers, but every cotton mill in the country and to many Northern bankers. Thinking it might be a favorable opportunity for me to advertise our stocks all through the country, we have prepared the enclosed advertisement and sent it to you before we give it to the paper, in order to have you pass judgment on the reference to the Loray stock. This is, of course, advertised in an indefinite way, and the facts in the case will only be given to those who make special inquiry. If there are any suggestions you would like to make, we would be glad to accept your judgment in the matter.

Will you return copy with your opinion Monday morning, if possible?

Very truly yours,
ABBOTT & STEPHENS.

Per W. C. W.

ADVERTISEMENT.

SOUTHERN MILL STOCKS

IN MANY CASES HAVE MADE THEIR OWNERS

INDEPENDENTLY RICH.

We are handling these stocks on commission, and shall be pleased to correspond with any one desiring either to buy or sell.

The best investment now on our list is

$100,000

stock in one of the finest, most modern mills in the South, which will be in operation in a few months, and the managers of which

125 have made a very high record in their other mills. We venture the prophesy that this stock will be worth two hundred in a very few years from the beginning of operation.

CAPITAL STOCK IS ONE MILLION DOLLARS, ALL OF WHICH IS TAKEN EXCEPT THE AMOUNT OFFERED BY US.

If interested in this or any other form of Southern investments, we shall be pleased to correspond with you.

ABBOTTS & STEPHENS,
Charlotte, N. C.

References:
Charlotte National Bank,
Commercial National Bank.

(Copy.)

TELEGRAM, SEPT. 12, 1900.

Gastonia, N. C., Sept. 12th, '00

The W. L. Wells Co.,
Vicksburg.

We are anxious to see Mr. Wells as soon as possible and arrange our business matters. When will he be here? Answer.

JOHN F. LOVE, Treas.

10:51 A. M.

LETTER OCT. 1, 1900.

Gastonia, N. C., October 1st, 1900.

Mr. W. L. Wells,
Vicksburg, Miss.

Dear Sir:

We inclose confirmation of telegram sent you to-day, and want you to ship us 50 bales weekly of the inch cotton to the Gastonia Cotton Mfg. Co., and give us the lowest price possible.

We would like to hear from you as soon as convenient how things

126 are getting along, condition of the market in your territory, etc. We were somewhat disappointed in that we expected to hear from you last week, and we trust you will not keep us waiting very much longer.

I hope you reached home safely and in good shape.

Yours very truly,

JOHN F. LOVE, Treas.

LETTER OCT. 5, 1900.

Vicksburg, Miss., Oct. 5th, 1900.

John F. Love, Esq.,
Gastonia, N. C.

Dear Sir:

I got home safe and sound Monday after leaving your place. I find things very much demoralized here, everybody expecting cotton to go to the sky, and acting as though every bale was the last chance to get one. As best I can take in the situation it looks to me like a wild speculation on the part of the buyers, and if so, there is coming a day of reckoning.

There is very little cotton being shipped and stocks are accumulating, but everything offered is bought up by the speculators, which takes it off the market for the time. Later on, I predict that they will experience that "tired feeling," and there will be some reasonable parity between futures and spots. I have not changed my opinion about buying; I think it will be later on, and for the time my idea is to await except just for immediate wants.

I notice you want 50 bales weekly for the Gastonia Mfg. Co., which shall have our best attention. Just now it is impossible to get it under 11c., and hard to do at this, but I hope it may get down some by next week.

By the way, when there we failed to talk anything about how you wanted to pay for this season's purchases. Some time last spring you wrote that you were going to arrange with the National Security & Guarantee Co. of New York for your cotton this season. Please let us know about this and oblige. We did not draw for the fifty bales yesterday, and will wait till we hear from you before doing anything.

Yours truly,

W. L. WELLS.

127 **LETTER OCT. 9, 1900.**

Gastonia, N. C., October 9th, 1900.

Mr. W. L. Wells,
Vicksburg, Miss.

Dear Sir:

Your favor of the 5th received and contents noted with interest. We would like to hear from you frequently about the market and cotton, and how it is going. We would also like to have your ideas often about buying cotton.

Just now we want you to ship us to the Gastonia Cotton Mfg. Co., just 50 bales of good inch cotton, also commence next week and ship 50 bales weekly to the Avon Mills until further notice.

As to payments on cotton we wish to remit you promptly for our immediate wants, and we are making arrangements with the National Surety Co. to get the money when we commence storing cotton.

Again, we would say that we are anxious to hear from you often, and we trust that cotton will go some lower.

Yours very truly,

JOHN F. LOVE, Treas.

LETTER OCT. 20, 1900.

Vicksburg, Miss., Oct. 20, 1900.

Mr. John F. Love, Treasurer,
Gastonia Cotton Mfg. Co.,
Gastonia, N. C.

Dear Sir:

Enclosed please find invoice and bill lading covering fifty bales cotton marked HOB-E, amounting to $2,660.77, which we wish safely to hand and satisfactory.

We are billing you this cotton at the same price we are to others on whom we draw with B-L attached, and we will thank you to remit us promptly, else we will make an actual loss on it.

Yours very truly,

W. L. WELLS CO.

J. T. W. Enc.

128 **LETTER OF OCT. 22, 1900.**

Gastonia, N. C., Oct. 22nd, 1900.

Mr. W. L. Wells,
Vicksburg, Miss.

Dear Sir:

Yours of the 20th received and contents noted with interest. We are very much obliged for your letter, and our views coincide exactly with yours in regard to the time for us to buy cotton, and at the same time when you think the market is right please go in and secure our cotton for storing for next year at the best prices you can possibly buy it for; we have already made arrangements with the National Surety Co. to get all the money we want on this cotton.

We have wired you to-day to forward us at once fifty bales for the Avon Mill, as we are nearly out.

In addition to the cotton, which you will soon commence to buy for storing, we want you to ship along fifty bales weekly to each of the mills, Ozark, Avon and Gastonia, for immediate consumption.

We will leave the matter with you now, and trust you will be able to get us in some nice lots at good prices.

Yours very truly,

JOHN F. LOVE, Treas.

LETTER OF OCTOBER 20, 1900.

Vicksburg, Miss., Oct. 20th, 1900.

John F. Love, Esq.,
Gastonia, N. C.

My Dear Mr. Love:

Cotton has had a slump that I anticipated, and if you remember prophesied when I was there. This has been what I expected, and many people who were big bulls with cotton a cent to 1¼c. higher, are now as rampant bears.

Receipts are going to be pretty heavy for the next sixty days, and prices may feel the weight of cotton, especially until after the election, but I see no good reason for much further decline.

129 At present prices I suppose there is some margin of profit to the manufacturers, and as all of the mills, both in this country and Europe, are bare of stocks, it seems to me that with the buying fever once on, prices may work higher rather than lower, and while I can't unreservedly encourage laying in a stock of cotton, it seems to me that it would be the part of wisdom to take on some at present prices. Thus far it has been very hard work to get the factors down on a basis of the decline, but I think by another week they will become reconciled and accept the market prices. Some how or other I can't help but feel that November and December are going to be favorabl- times to buy cotton.

Yours very truly,

W. L. WELLS.

TELEGRAM OCT. 25, 1900.

Oct. 25th, 1900.

John F. Love, Treasurer,
Gastonia, N. C.

Think obviousness crop about Bluish nice lot for Avon Amenities landed. This is relatively cheap. What do you think of it? Ritual.

W. L. WELLS CO.

Translation: Think we can buy crop about 150 (bales) nice lot for Avon, 11c., landed. This is relatively cheap. What do you think of it? Answer early to-morrow.

LETTER OCT. 26, 1900.

Gastonia, N. C., Oct. 26th, 1900.

Mr. W. L. Wells,
Vicksburg, Miss.

Dear Sir:

We have your telegram of the 25th in regard to buying 150 bales for the Avon at 11c., and we have wired you to buy it. We herewith enclose confirmation of same.

We think it the part of wisdom to get hold *off* some now, and if it goes lower we will take on some more, and thus reduce our average.

130 We appreciate your wiring us in regard to this lot, and will be pleased to hear from you often.

Yours very truly,

JOHN F. LOVE, Treas.

LETTER OCT. 31, 1900.

Vicksburg, Miss., Oct. 31st, 1900.

Mr. John F. Love,
Gastonia, N. C.

Dear Mr. Love:

We are shipping to-day the crop of 150 bales, and will ship the other crop to-morrow. I suppose you will want us to carry this cotton until it arrives, when you will reimburse us through your arrangement with the National Surety Co. Please let us know definitely about this, that we may know just what to say to our bank about it.

We have had this cotton loaded in Southern R. R. cars and it should go through promptly and in solid car lots, and not broken up as it was last season.

Yours very truly,

W. L. WELLS.

J. T. W

LETTER NOV. 3, 1900.

Gastonia, N. C., November 3rd, 1900.

W. L. Wells, Esq.,
Vicksburg, Miss.

My Dear Mr. Wells:

Yours of the 31st ult. We are arranging with the National Surety Company to get all the money you want, and as you suggest you can arrange with your bank accordingly.

We trust the railroads will push our cotton through as fast as possible. It has been very slow this season coming in.

Mills are running well and cotton is fine. No complaints, and we want you to keep sending the same cottons.

The election will soon be over, and we are looking for a Mc-

131 Kinley landslide and election, if so, much better times and easy money matters. Putting roof on Loray and otherwise doing well.

I beg to remain, Yours truly

JOHN F. LOVE.

Glad to see good weights.

TELEGRAM NOV. 12, 1900.

Nov. 12, 1900.

John F. Love, Treas.,
Gastonia, N. C.

We see chance to buy four to five hundred bales good grade inch to inch sixteenth ten three-eights landed. What do you think about buying? Answer.

W. L. WELLS CO.

TELEGRAM NOV. 12, 1900.

Gastonia, N. C., Nov. 12, '00.

W. L. Wells Co.,
Vicksburg.

Buy four to five hundred bale lot, price named.

JOHN F. LOVE, Treas.

LETTER NOV. 13, 1900.

Vicksburg, Miss., Nov. 13th, 1900.

Mr. John F. Love, Treas.,
Gastonia, N. C.

Dear Sir:

We have your telegram of yesterday saying "Buy the four to five hundred bales at prices named," and we beg to report having bought same, but can't say just how many bales we will be able to get. We hope, however, to get the full amount. We bought this lot from one of "God's chosen people," and you know you can't count on them on an advancing market. In fact, he did everything to back out of the trade, but we put the screws to him so tight he couldn't fly the track altogether.

132 While he is chafing under the trade, we think eventually we will get out with about what is due us. On cotton for the Avon it now looks that 11½ cents is about as cheap as you can expect it. In fact, the two lots of 150 and 100 bought at 11c. a little while back seems to have been rather a fluke purchase, as we have never been able to duplicate it, and, as we stated at the time, we were offered a handsome profit on these lots before we took them up; so you can count yourself just that much ahead on those lots. There seems to be a general demand just now, as we predicted that we would not be surprised to see, and a scramble, and if so, higher prices. These prices look awfully high to us, but we don't see any good reason for lower prices. Naturally we feel timid to go ahead, and would be pleased to have your views from time to time.

Hope you have perfected your arrangements with the National Co., and will be able to remit us promptly as the cotton is received, as it runs into money at a terrible rate, and it does not take long to get in very bad shape with our bank.

Yours very truly,

W. L. WELLS CO.

W. L. W.

LETTER NOV. 17, 1900.

Gastonia, N. C., Nov. 17th, 1900.

Mr. W. L. Wells,
Vicksburg, Miss.

Dear Sir:

We have your favor of the 13th, and in reply would say that we think your purchase of 400 to 500 bales for the Gastonia Mill is all right. We hope you will look out for us and pick up some more good lots.

In regard to the Avon, as goods have not advanced, we dislike to pay 11½c., but if that is the best you can do we will have to take the medicine. Our goods have not advanced, and are lower now than when we took our last contracts; but as we waive orders to run until the first of the year, we are now making efforts to sell any just now.

As to Ozark cotton, Mr. Rankin says he wishes you to look out for him and pick up some good lots, if you can, and let him hear from you.

133 On money matters, we have perfected our arrangements, and were looking for a check to-day, but it has failed to come, and we expect it now the first of the week, when we will make you a good remittance.

Yours very truly,

JOHN F. LOVE, Treas.

LETTER NOV. 19, 1900.

Gastonia, N. C., Nov. 19, 1900.

W. L. Wells, Esq.,
Vicksburg, Miss.

My Dear Mr. Wells:

I enclose you check for $25,000.00 on account. I trust you will pick up some more bargains, and do the best you can for us, and oblige.

Loray and all the mills doing very well.

Getting on very well, and remain,

Yours,

JOHN F. LOVE.

LETTER NOV. 21, 1900.

Vicksburg, Miss., Nov. 21st, 1900.

John F. Love, Esq.,
Gastonia.

Dear Mr. Love:

Yours of the 19th enclosing N. Y. check for $25,000.00 received, for which accept thanks.

We have about brought our Jew friend around, and there seems now no doubt about our getting the 400 bales. Have secured a beautiful lot for Avon in Greenwood, which will be shipped in a few days. Also a lot of 200 bales from a point in Arkansas for Avon, which we presume we will get. We bought this lot on same basis as the 250 bales 11c., but the big rise in the market makes us uncertain about it until we have got it. You know you can't risk all cotton buyers. The Greenwood lot is 118 bales and cost 11¼ landed,

134 but it is very fine staple. We are working like beavers for you, and think we have done you good service the past ten days. Look out for a jump in the market, and my advice would be not to sell any goods right now. I believe the market will go a cent higher.

Please reimburse us as fast as possible, as cotton runs into money at an alarming rate, and to be heavily overdrawn naturally makes us timid about buying.

Yours,

W. L. WELLS.

LETTER DEC. 18, 1900.

Vicksburg, Miss., Dec. 18th, 1900.

Mr. John F. Love, Treas.,
Gastonia, N. C.

Dear Sir:

Referring to enclosures. This hundred bales has considerable in it suitable for Avon, but the shippers marked the two lots before we had an opportunity of separating, hence you will have to look out for this on arrival; or, if you prefer, and will send us redrawn samples with your tag numbers in each, we will separate and give the lots of each. The poorest of this lot you will find extra fine for Gastonia Mills, and we suggest that you work it in by itself, or on some particular work, where you want extra strength. We presume our recent shipments are in, and if so, please remit as soon as possible, as we stand very much in need of same.

The lot we wired you about the other day, as yet we have been unable to buy, owing to death in the family of the party who has it in charge. There is also some disinclination on the part of the owner to accept our bid, unless we will agree to take in some forty or fifty bales of the same crop which will not go better than strict low middling to middling in grade. If you think it advisable to take this lower end in, you might wire us on receipt of this. It is a nice crop of cotton, and we hate to see it go by.

Yours very truly,

W. L. WELLS CO.

W. L. W.

135 **LETTER DEC. 20, 1900.**

Vicksburg, Miss., Dec. 20th, 1900.

Mr. John F. Love, Treas.,
Gastonia, N. C.

Dear Sir:

We have yours of the 18th inst., and regret very much to hear that the 200 bales PAR-K and NOT-A are not working well. This was a case of trying to save you some money by buying outside cotton. These two lots came from Arkansas, and as it was from a section where we had two years ago bought you some good cotton, and it was offered to us cheap, we were tempted to buy, hoping to serve your best interest; but it has turned out otherwise, and we shall confine ourselves to this territory hereafter.

We have your telegram saying to buy the crop of cotton if the staple is all right, and regret to report that we are unable to buy it, as the owner has decided not to sell until after the holidays. We think the real reason was that he did not want to take the price, thinking that cotton would in the mean time advance.

It is likely to be very dull for the next two or three weeks, and we think we will be able to buy some as good or better cotton at this price, unless the market improves more than we see any reason for its doing. There is considerable cotton on the market of rather dull color, but not leafy, middling to strict middling, very full, strong, silky, 1⅛ to full 1 3-16, which we can probably buy as cheap as strict middling and good middling 1⅛, such as we have been buying for Avon, and it strikes us that this kind of cotton would probably do your work better. It is about such staple as Abernethy and the Clover people use, except not quite so good in grade.

We have just learned that documents for 129 bales BAL-D and 210 ROC-K have been sent you by error, and we are telegraphing you to return them. These lots are for the Clover people. Perhaps it will make you feel good to compare your prices with theirs, for almost the identical cotton; and just here we are reminded that if the market stiffens up much we will not be able to buy full quality for Avon under 11¾c. to 12c., and we would like to know what you think about this.

Yours very truly,

W. L. WELLS CO.

W. L. W.

136 **LETTER DEC. 22, 1900.**

Gastonia, N. C., Dec. 22nd, 1900.

Mr. W. L. Wells,
Vicksburg, Miss.

My Dear Sir:

Your favor of the 20th received, and we *not* what you have to say in regard to the 200 bales PAR-K and NOT-A for the Avon, and we know that in taking these lots you hoped to serve our best interests, but as it has turned out otherwise you will confine yourself to Vicksburg territory. This, we believe, will be the best policy, even if we have to pay the price, as we have had no end of trouble with the Arkansas cotton in the mill, work running so unsatisfactory and production reduced so much that the mill has really lost money in using this lot. We are now trying to get rid of it by mixing it in a small proportion with the Vicksburg cotton, and we feel like it takes such an indefinite time to get it all out of the way; but we hope to work it through so that our yarn and cloth people will not give us any trouble about it.

In regard to the cotton that is being offered of a dull color, not very leafy, middling to strict middling, but of a full, strong staple, this color will not make any difference to us, and if it has the strength and the length, that is what we want, and we believe it will suit our work all right.

We are not inclined to take a bullish view of things now, and for this reason believe it best to be rather quiet and pick up suitable lots that you may find at conservative prices—that is, something that will suit us at the best prices possible.

Yours very truly,
JOHN F. LOVE, Treas.

LETTER DEC. 22, 1900.

Vicksburg, Miss., Dec. 22nd, 1900.

Mr. John F. Love,
Gastonia, N. C.

Dear Mr. Love:

Much obliged to you for copy of Craig's telegram to Mr. Gray. From the prices he asks it would appear he wants to get all of his

137 $10,00.00 stock back in the first transaction. I would be very glad to have the order now at 10¾c., and believe I could have bought it before the recent advance, or on the day he sent the telegram at 10½, and made a reasonable profit. It may be, and I think very likely it will, if this gentleman buys their cotton, not to be a great while before they decide they have gotten hold of a very expensive stockholder. This is, however, all grave-yard talk, and you must so consider it, as I make it a plan not to advise other people about their business.

I send you by express some "nuts to crack," which I hope you will find easier to crack than some of the business nuts we have had lately, for instance, what the yarn and cotton markets are going to do, and whether it will pay to build a million and one-half dollar mill to clothe the heathen Chinee, and when and how the Chinese question is going to be settled, etc.

Wishing you and yours a merry and happy Christmas, I am,

Yours very truly,

W. L. WELLS.

LETTER JAN. 2, 1901.

Vicksburg, Miss., Jan. 2nd, 1901.

Mr. John F. Love, Treas.,
Gastonia, N. C.,

Dear Sir:

We have yours of the 31st ult., and have credited your account with the 5c. per cwt. overcharge on the 50 bales MOH $13.03.

By the way, what about paying for some cotton? Certainly most, if not all, of our shipments since the middle of November have arrived, and we see no reason why we should not be paid according to the understanding. We don't call to mind an instance in our experience where we have worked harder to secure a lot of cotton than we did in these purchases for you, and, of course, we feel that we are entitled to as prompt a reimbursement as it is possible for you to make.

Yours very truly,

W. L. WELLS CO.

W. L. W.

138 **TELEGRAM JAN'Y 31, 1901.**

Jan. 31st, 1901.

John F. Love,
Gastonia, N. C.
When can we expect a remittance? Answer.
W. L. WELLS CO.

TELEGRAM FEB'Y 4, 1901.

Feby. 4th, 1901.

John F. Love,
Gastonia, N. C.
When do you expect to organize and elect officers for the Loray? Answer.
W. L. WELLS.

LETTER FEB'Y 5, 1901.

Gastonia, N. C., Feby. 5th, 1901.

Mr. W. L. Wells,
Vicksburg, Miss.
Dear Mr. Wells:

We wired you this morning in answer to your telegram of the 4th, that we hope to organize the Loray Mills and elect officers in a few weeks. We had expected to do this the first of the year, but on account of arranging some matters we thought best to postpone it a short while, and now think it best to organize within the next thirty or sixty days at the outside. I have spoken to a number of our stockholders about this plan, among them Messrs. Harry and G. M. Whitin, of Mass., and informed them that you were one of our stockholders, and would be vice-president. They were pleased to hear this and to express their good opinion of you; they think a great deal of Mr. Wells.

Our people are now putting the finishing touches to the buiiding and the cotton houses and overseer's houses will all be completed in a few weeks. The machinery is coming right along; part of the engine is her-, two cars of shafting have arrived, and looms are coming in daily, and some of the spinning and carding, several car loads, have been shipped this week. Our stokers and boilers have been in

139 position for some weeks, and are ready to fire up; the heating outfit has also been installed.

Yours very truly,
JOHN F. LOVE.

Deposited by
W. L. WELLS Co.
with
GASTONIA BANKING Co.,
Gastonia, N. C.

3-14-1900.

Specify the banks on which checks are drawn.

	Dollars.	Cents.
Specie		
Bills		
Checks		
Avon	$32,735	96

Deposited by
W. L. WELLS Co.
with
GASTONIA BANKING Co.,
Gastonia, N. C.

March 14th, 1900.

Specify the banks on which checks are drawn.

	Dollars.	Cents.
Specie		
Bills		
Checks	18,901	38
G. C. Mfg. Co		

140

Deposited by

LORAY MILLS

with

GASTONIA BANKING CO.,

Gastonia, N. C.

July 31st, 1900.

Specify banks on which checks are drawn.

	Dollars.	Cents.
Specie		
Bills		
Checks		
W. L. Wells	10,000	00

12-3-1900.

W. L. WELLS CO.

Deposited with

THE GASTONIA BANKING CO.,

Gastonia, N. C.

Specify the banks on which checks are drawn.

	Dollars.	Cents.
Specie		
Bills		
Checks		
Avon	17,788	85
Gastonia	22,899	23
	$40,688	08

141 12-3-1900.

LORAY MILLS

Deposited with

THE GASTONIA BANKING CO.,

Gastonia, N. C.

Specify the banks on which checks are drawn.

	Dollars.	Cents.
Specie		
Bills		
Checks		
W. L. Wells	40,000	

LETTER OCT. 7, 1899.

Gastonia, N. C., October 7th, 1899.

W. L. Wells, Esq.,
Vicksburg, Miss.

Dear Sir:

We thought maybe we might have heard from you this week, but suppose you have been too bust to write. How did you find matters on your return home, and how is cotton going? Have you bought any for our account as yet, and how soon do you think you will begin shipping us? I trust the break of yesterday will continue until we can buy some cotton and get the advantage of the decline.

Let us hear from you as often as you can get time to write, and keep us fully posted.

Our new mill is progressing nicely, and we trust to hear from you in regard to it soon, and see what your friend or friends will do for us. We will have the site surveyed on Monday and get the deed all fixed up.

Let us hear from you as soon as possible.

Yours very truly,

JOHN F. LOVE, Treas.

142 **LETTER OCT. 28, 1899.**

Gastonia, N. C., October 28th, 1899.

W. L. Wells, Esq.,
Vicksburg, Miss.,

My Dear Friend:

Since writing to you a week ago I have decided that it will be best for me to postpone my trip down to see you now, and make a trip to New York, and call to see you a little later on, as I wish to get some matters arranged before I come down to see you on my pleasure trip.

If you and your friends have decided about the mill stock we would be glad to hear from you as soon as possible, as I want to know your decision before I go East. Mill is taking nice shape, and we will go on with it and it seems no longer id doubt.

We trust you have bought some cotton for us again this week, and that it will soon be arriving and by the Southern Railway. We are in shape to take care of it and put it away.

Let us hear from you as soon as possible, and if you decide about the stock, if you remember we told you we would call the money 10 per cent. per month, commencing with January 1st, 1900.

We remain, Yours truly,

JOHN F. LOVE, Treas.

MINUTES OF FIRST MEETING OF STOCKHOLDERS LORAY MILLS.

Gastonia, N. C., July 8th, 1901.

Minutes of the first meeting of the stockholders of the Loray Mills, called pursuant to section 18 and 50 of the act of the Legislature of North Carolina (1901), entitled "An act to revise the corporation law of North Carolina," and held, after due notice, in the office of the Gastonia Banking Co., at the hour of 2:30 P. M., on the 8th day of July, 1901. (the Loray Mills not having any fixed office.)

On motion, W. T. Rankin was unanimously elected chairman of the meeting, and Frost Torrence was in like manner elected secretary.

On motion, Geo. A. Gray, W. A. Haffner and F. W. Bradley were appointed a committee to examine and report the number of shares

143 of stock in said company represented either in person or by proxy. Said committee reported 3,830 shares of stock represented; in person, 1,368 shares, as follows:

Caleb Bradley, 30 shares.
F. W. Bradley, 10 shares.
W. T. Rankin, 20 shares.
Edward Whitesides, 40 shares.
W. A. Haffner, 8 shares.
J. B. Swann, 10 shares.
Frost Torrence, 50 shares.
W. O. Sample, 10 shares.
J. M. Sloan, 20 shares.
Textile Mill Supply Co., 150 shares.
E. H. Adams, 20 shares.
Jno. F. Love and Geo. A. Gray, 1,000 shares.
Total, 1368 shares in person; and 2,462 shares by proxies, to-wit:
A. C. Lineberger, 100 shares, proxy to John F. Love.
J. L. Agurs, 100 shares, proxy to Geo. A. Gray.
H. A. White, 50 shares, proxy to John F. Love.
E. E. Gillespie, 5 shares, proxy to John F. Love.
Fate M. Wicker, 5 shares, proxy to John F. Love.
Sarah E. Whitin, 100 shares, proxy to John F. Love.
Whitridge, White & Co., 5 shares, proxy to John F. Love.
Henry T. Whitin, 300 shares, proxy to John F. Love.
Nancy Aiken, 7 shares, proxy to John F. Love.
S. L. Morris, 15 shares, proxy to John F. Love.
W. P. White, 10 shares, proxy to John F. Love.
Wm. E. McIlwaine, 20 shares, proxy to John F. Love.
Mrs. Emma Sagendolph, 10 shares, proxy to John F. Love.
Arthur Sangendolph, 10 shares, proxy to John F. Love.
J. A. Dickey, 20 shares, proxy to John F. Love.
L. G. Dick, 20 shares, proxy to John F. Love.
Mrs. Lula M. Barr, 15 shares, proxy to John F. Love.
Woodward, Baldwin & Co., 500 shares, proxy to John F. Love.
W. J. Roddey, 10 shares, proxy to W. T. Rankin.
Mrs. Jno. Harvey, 5 shares, proxy to John F. Love.
Jno. Harvey, Jr., 5 shares, proxy to John F. Love.
Jas. E. Mitchell, 250 shares, proxy to John F. Love.
Jno. J. Mitchell, 30 shares, proxy to John F. Love.
W. T. Berry, 20 shares, proxy to John F. Love.
Jno. McGill, 100 shares, proxy to John F. Love.

144 Irvin Shupp, 50 shares, proxy to John F. Love
Caleb J. Milne, 25 shares, proxy to John F. Love.
Mrs. Mary A. Pritchard, 5 shares, proxy to John F. Love.
W. G. Neville, 10 shares, proxy to John F. Love.
Stephen Greene, 50 shares, proxy to John F. Love.
J. H. Wilkins, 3 shares, proxy to John F. Love.
C. M. Cooke, 2 shares, proxy to John F. Love.
Stephen Greene, 100 shares, proxy to A. Burwell.
W. L. Wells, 500 shares, proxy to John F. Love.
Total, 2,462 shares by proxies.

And it appearing from the report of said committee that a majority of all the stock subscribed for and issued by said corporation, to-wit: 3,830 shares, is represented either in person or by proxy, the meeting was declared duly organized; whereupon John F. Love and Geo. A. Gray submitted the following report, viz.:

"To the stockholders of the Loray Mills:

The undersigned respectfully report that, assuming to act for your company, and with the approbation of all the stockholders, they purchased for the company the land upon which the mill building is erected, containing 143 acres, as described in the deeds, which have been duly registered in this county. They paid for this land out of the money in their hands subscribed to the stock of this company $10,310.17, as will appear by referring to the said deeds.

We adopted as the seal of the company a seal which makes this impression, and have used this in all our acts done in the name of the company.

We have issued stock to the parties named in the list of stockholders hereto attached and have received in cash or machinery the par value therefor.

The condensed statement hereto attached will show the disbursements made by us and under our direction on account of the company, and will also show its resources and liabilities, all of which may be verified by you by referring to the books of account which are herewith also submitted to you.

We respectfully ask the stockholders to ratify and confirm what we have done in their behalf, in the issuing of stock, in the purchase of lands, in the erection of buildings thereon, and the purchase of machinery therefor.

This the 8th day of July, 1901.

(Signed.) GEO. A. GRAY.
(Signed.) JNO. F. LOVE."

145 **List of Stockholders Attached to the Foregoing Report.**

A. C. Lineberger, Mt. Holly, N. C., 100 shares.
J. L. Agurs, Chester, S. C., 100 shares.
H. A. White, trustee, Philadelphia, Pa., 50 shares.
E. E. Gillespie, Greensboro, N. C., 5 shares.
Kate M. Wicker, Carthage, N. C., 5 shares.
Caleb Bradley, Gastonia, N. C., 30 shares.
Whitridge, White & Co., Baltimore, Md., 5 shares.
Sarah E. Whitin, Whitinsville, Mass., 100 shares.
Henry T. Whitin, Northbridge, Mass., 300 shares.
Nancy Aiken, Yorkville, S. C., 7 shares.
S. L. Morris, Macon, Ga., 15 shares.
W. P. White, Philadelphia, Pa., 10 shares.
Wm. E. McIlwaine, Pensacola, Fla., 20 shares.
Jas. G. Garland, Biddeford, Me., 15 shares.
Jas. E. Orr, Worcester, Mass., 10 shares.
F. W. Bradley, Concord, N. C., 10 shares.
W. T. Rankin, Gastonia, N. C., 20 shares.
Edward Whitesides, Gastonia, N. C., 40 shares.
Emma Sagendolph, Spencer, Mass., 10 shares.
Arthur Sagendolph, Spencer, Mass., 10 shares.
W. Howard, Easton, Pa., 10 shares.
J. A. Dickey, Washington, D. C., 20 shares.
L. G. Dick, Lynchburg, Va., 20 shares.
Mrs. M. V. Patterson, Chester, S. C., 20 shares.
Lula M. Barr, Ridge Springs, S. C., 15 shares.
Woodward, Baldwin & Co., New York city, 500 shares.
W. J. Roddey, Rock Hill, S. C., 10 shares.
W. A. Haffner, Bowling Green, S. C., 8 shares.
Mrs. John Harvey, Snow Hill, N. C., 5 shares.
Jno. Harvey, Jr., Snow Hill, N. C., 5 shares.
Jas. E. Mitchell, Philadelphia, Pa., 250 shares.
Jno. J. Mitchell, Philadelphia, Pa., 30 shares.
J. B. Swann, Bullock's Creek, S. C., 10 shares.
Frost Torrence, Gastonia, N. C., 50 shares.
Wm. T. Berry, Lynchburg, Va., 25 shares.
W. O. Sample, Lodo, N. C., 10 shares
John McGill, Philadelphia, Pa., 100 shares.
Irvin Shupp, Philadelphia, Pa., 50 shares.
J. M. Sloan, Gastonia, N. C., 20 shares.
Jno. F. Love and Geo. A. Gray, Gastonia, N. C., 1,000 shares.
Mrs. John J. Mitchell, Jr., Boston, Mass., 5 shares.
Mrs. M. A. Gould, Boston, Mass., 10 shares.
A. G. Brice, Chester, S. C., 10 shares.
Caleb J. Milne, Philadelphia, Pa., 25 shares.
D. J. Currie, Chapel Hill, N. C., 9 shares.

146 Mary A. Pritchard, Blacksburg, Va., 5 shares.
W. G. Neville, Yorkville, S. C., 10 shares.
Miss V. Berry, Lynchburg, Va., 3 shares.
Stephen Greene, Boston, Mass., 50 shares.
Textile Mill Supply Co., Charlotte, N. C., 150 shares.
J. H. Wilkins, Bessemer City, N. C., 3 shares.
C. M. Cooke, Bessemer City, N. C., 2 shares.
Saco & Pettee Machine Shops, Newton Upper Falls, Mass., 100 shares.
W. L. Wells, Vicksburg, Miss., 500 shares.
J. L. Falls, Gastonia, N. C., 10 shares.
E. H. Adams, Bowling Green, S. C., 20 shares.
Total, 3,932 shares.

Condensed Statement Showing Disbursements, Also Resources and Liabilities Attached to the Foregoing Report.

Resources.

Real estate	$488,874.11	
Machinery	371,934.48	
Interest	28.25	
Insurance	3,922.19	
General Fire Extinguisher Co.	1,714.33	
Cash in bank	889.49	
Total		$867,362.85

Liabilities.

Bills payable	$24,168.36	
Standard Oil Co.	25.29	
U. S. Cast Iron P. & F. Co.	3,000.00	
Michigan Brass & Iron Works	1,302.23	
Saco & Pettee Mch. Shops	33,404.80	
Jones & Laughlin	36,304.88	
B. F. Sturtevant Co	10,846.55	
Cohoes I. F. & Mach. Shops	11,495.00	
Whitin Machine Shops	1,164.66	
Green Fuel Economizer Co.	2,954.72	
Draper Co.	98,213.60	
Textile Mills Supply Co.	24,901.54	
C. & G. Cooper Co.	71,527.71	
Lockwood, Greene & Co.	767.71	
Salem Foundry & Mch. Shop	2,799.63	
Flynt Building & Cons. Co.	150,511.17	
J. L. Bryan	625.00	
B. R. Smith	150.00	
Stock issued	393,200.00	
Total		$867,362.85

147 On motion of J. M. Sloan, seconded by R. B. Goff (of the Textile Mill Supply Co.), said report was unanimously accepted, adopted and approved, as is shown by the following stock vote:

A. C. Lineberger, 100 shares, by Jno. F. Love, proxy vote aye.
J. L. Agurs, 100 shares, by Geo. A. Gray, proxy vote aye.
H. A. White, trustee, 50 shares, by Jno. F. Love, proxy vote aye.
E. E. Gillespie, 5 shares, by Jno. F. Love, proxy vote aye.
Kate M. Wicker, 5 shares, by Jno. F. Love, proxy vote aye.
Calbe Bradley, 30 shares, by in person, vote aye.
Whitridge, White & Co., 5 shares, by Jno. F. Love, proxy vote aye.
Sarah E. Whitin, 100 shares, by Jno. F. Love, proxy vote aye.
Henry T. Whitin, 300 shares, by Jno. F. Love, proxy vote aye.
Nancy Aiken, 7 shares, by Jno. F. Love, proxy vote aye.
S. L. Morris, 15 shares, by Jno. F. Love, proxy vote aye.
W. P. White, 10 shares, by Jno. F. Love, proxy vote aye.
Wm. E. McIlwaine, 20 shares, by Jno. F. Love, proxy vote aye.
F. W. Bradley, 10 shares, in person, vote aye.
W. T. Rankin, 20 shares, in person, vote aye.
Edward Whitesides, 40 shares, in person, vote aye.
Emma Sagendolph, 10 shares, by Jno. F. Love, proxy vote aye.
Arthur H. Sagendolph, 10 shares, by Jno. F. Love, proxy vote aye.
J. A. Dickey, 20 shares, by Jno. F. Love, proxy vote aye.
L. G. Dick, 20 shares, by Jno. F. Love, proxy vote aye.
Lula M. Barr, 15 shares, by Jno. F. Love, proxy vote aye.
Woodward, Baldwin & Co., 500 shares, by Jno. F. Love, proxy vote aye.
W. J. Roddey, 10 shares, by T. W. Rankin, proxy vote aye.
W. A. Haffner, 8 shares, in person, vote aye.
Mrs. Jno. Harvey, 5 shares, by Jno. F. Love, proxy vote aye.
Jno. Harvey, Jr., 5 shares, by Jno. F. Love, proxy vote aye.
Jas. E. Mitchell, 250 shares, by Jno. F. Love, proxy vote aye.
Jno. J. Mitchell, 30 shares, by Jno. F. Love, proxy vote aye.
J. B. Swann, 10 shares, in person, vote aye.

148 Frost Torrence, 50 shares, in person, vote aye.
Wm. T. Berry, 25 shares, by Jno. F. Love, proxy vote aye.
W. O. Sample, 10 shares, in person, vote aye.
Jno. McGill, 100 shares, by Jno. F. Love, proxy vote aye.
Irvin Shupp, 50 shares, by Jno. F. Love, proxy vote aye.
J. M. Sloan, 20 shares, in person, vote aye.
Jno. F. Love and Geo. A. Gray, 1,000 shares, in person, vote aye.
Caleb J. Milne, 25 shares, by Jno. F. Love, proxy vote aye.
Mary A. Pritchard, 5 shares, by Jno. F. Love, proxy vote aye.
W. G. Neville, 10 shares, by Jno. F. Love, proxy vote aye.
Stephen Green, 150 shares, by Jno. F. Love, proxy vote aye.
Textile Mills Supply Co., 150 shares, in person by R. B. Goff, vote aye.
J. H. Wilkins, 3 shares, by Jno. F. Love, proxy vote aye.
C. M. Cooke, 2 shares, by Jno. F. Love, proxy vote aye.
W. L. Wells, 500 shares, by Jno. F. Love, proxy vote aye.
E. H. Adams, 20 shares, in person, vote aye.
Total vote, 3,830 shares, aye.

On motion, the seal of the company, the imprint of which is attached to the report heretofore adopted, was accepted an- unanimously adopted as the seal of the corporation.

On motion, the following by-laws were unanimously adopted by the same stock vote, by which report of Geo. A. Gray and Jno. F. Love, as above recored was adopted:

By-Laws of the Loray Mills.

Article I. Stockholders.

The annual meeting of the stockholders of the company shall be held at the office of the company, in Gastonia, North Carolina, on the second Tuesday in March, in each year, at two o'clock P. M., for the purpose of the election of directors and the transaction of such other business as may lawfully come before the meeting. The notice of such annual meeting shall be given to each stockholder of record appearing on the books of the corporation by sending through the mail to their address appearing on the books, at least ten days prior to such meeting, a written or printed notice signed by the secretary, stating the time and place of such meeting.

Special meetings of the stockholders may be called by the Board of directors and notice thereof shall be given in the same manner as

149 is provided with respect to the annual meetings, and shall state the purpose for which such special meetings are called, and they shall be held at the company's office.

Each stockholder shall be entitled to cast one vote for each share of stock held by him at any election, or on any subject before any annual or special meeting of the stockholders, and such votes may be cast either in person or by proxy.

Article 2. Board of Directors.

Section I. The Board of Directors shall consist of five (5) stockholders. They shall be elected immediately after the adoption of these by-laws, and annually thereafter at the annual meetings.

Section II. The Board of Directors shall have the management and control of the business of the corporation, and shall employ such agents and servants as they may deem advisable, and fix the rates of compensation of all officers, agents and employees.

Section III. Express power and authority are hereby conferred upon the Board of Directors, from time to time, to borrow on the credit and responsibility of the corporation such sums of money as they may deem necessary or proper for the purpose and interests of the corporation, in such form and for such time as they may deem proper, and to pledge or mortgage any or all stocks, bonds, securities or other estate, real or personal, belonging to the corporation, as security for the repayment of such loans and advances.

Section IV. The Board of Directors shall meet at such times and places as they may by resolution determine, provided, however, that they shall meet at least as often as once in every twelve months.

Section V. Whenever any vacancies shall occur in the Board of Directors by death, resignation or otherwise, the same shall be filled without undue delay by the majority vote by ballot by the remaining members of the Board. The person or persons so chosen shall hold office until the next annual meeting, or until his or their successor or successors shall be elected.

Section VI. A majority of the members of the Board of Directors shall constitute a quorum for the transaction of business.

Article 3. Officers.

Section I. The officers of the corporation shall be a president, a vice-president and secretary and treasurer. The office of secretary and treasurer may be held by the same person.

150 Section II. The officers shall be elected by the Board of Directors by a majority vote of the whole number of directors. The first election shall be held immediately after the organization of the Board of Directors. Subsequent elections shall be held annually on the day of the regular meeting of the Board of Directors next ensuing the annual election. The day to be fixed by resolution of the Board of Directors.

Section III. It shall be the duty of the president to preside at all meetings of the stockholders and of the directors, and to attend meetings of any committee when requested by the chairman, to sign all certificates of stock, and to cause the seal of the corporation to be attached thereto when required. He shall have custody of the seal of the corporation, and power to affix the same to any and all such documents and instruments as the Executive Committee or Board of Directors may authorize to be authenticated by the corporate seal. The president may from time to time call special meetings of the Board of Directors whenever he shall deem proper to do so, and shall do so whenever three members of the Board shall request him in writing to do so. He shall at all times exercise a general supervision and direction over the affairs of the corporation. In all cases where the duties of the subordinate officers and agents of the corporation are not specially prescribed by the by-laws or resolution of the Board, such officers and agents shall obey the orders and directions of the president.

Section IV. The vice-president shall perform such duties as shall be assigned to him by the Executive Committee or Board of Directors. In case of the death, absence or inability of the president to act, his powers shall be exercised by the vice-president; and in case of the death, absence or inability of the vice-president the duties and powers of the president shall devolve upon one of the directors, to be appointed by the Executive Committee.

Section V. The secretary shall keep a record in due form of the proceedings all meetings of the stockholders, of the directors and of the Executive Committee and also of the other committees of the Board. He shall also prepare and keep proper books of account of the business of the corporation, subject to the inspection and direction of the president or Executive Committee of the Board of Directors. All books, papers and correspondence shall be kept in the office of the corporation; and all such, except as the same are especially placed in the custody of some other officer, shall be in charge of the secretary, and shall be open at all times to the inspection of the directors. The secretary shall sign all documents requiring the signature of the president, and shall perform the duties

151 usually appertaining to the office of secretary. In case of the death, absence or inability of the secretary to act, his duties and powers shall be exercised by a secretary pro tempore, to be appointed by the Executive Committee.

Section VI. The treasurer shall keep a record of all moneys received and paid out and of all vouchers and receipt given therefor. He shall examine and approve all checks for payment of money, and no voucher or certificate of any kind shall be issued from the office unless his inspection or approval be certified thereon. He shall have general charge of all books, vouchers and papers belonging to the corporation, except such as are under the control of the secretary, and such as are specially placed under the control of some other officer, and shall perform such other duties as are incident by law to the office of treasurer, and as may be required by the president or Executive Committee or Board of Directors.

Section VII. All moneys of the corporation or under its charge deposited in any bank or other place of deposit shall be deposited to the credit of the corporation in its corporate name.

Section VIII. In case of the death, resignation or removal of any officer of the corporation, the Board of Directors shall elect his successor, who shall hold his office until the next annual meeting of the board.

Section IX. The Board of Directors may annually elect an Executive Committee, consisting of the president and two other directors, who shall hold their offices until their successors are elected. All vacancies shall be filled by the Board of Directors. The Executive Committee shall meet at such times as shall be fixed by themselves or the Board of Directors.

Section X. The Executive Committee shall exercise all the powers of the Board of Directors when such board is not in session. Regular minutes of the proceedings of the Executive Committee shall be kept in a book provided for that purpose, which shall always be open to the inspection of the directors, and the proceedings of such committee for the *proceeding* time since their last meeting shall be reported to and read at each meeting of the Board of Directors.

Article 4. Certificates of Stock.

Section I. Certificates of the capital stock of the corporation shall be numbered and registered as they are issued. They shall exhibit the holder's name, place of residence and the number of shares and

152 shall bear the corporate seal. Transfers of stock shall only be made on the books of the corporation, in the presence of the treasurer, or other authorized officer of the corporation, by the holder in person or by attorney; and the possession of a certificate of stock (as between the holder and the corporation) shall not be regarded as vesting any ownership of the same in any person other than the registered owner.

ARTICLE 5. CORPORATE SEAL.

Section I. The corporate seal of the corporation shall be a circular seal, with the name of the corporation around the border and the date of the organization in the center. The Board of Directors may change the style of the corporate seal at their pleasure.

ARTICLE 6. DEFAULTING SUBSCRIBERS.

Section I. If any subscriber for stock of the corporation shall fail to pay for the same when called for by the Board of Directors for two months, the stock of such delinquent may be declared forfeited by the Board of Directors and sold for account of such delinquent, publicly, after thirty days' notice, and the net proceeds of such sale be applied first to all amounts due upon such stock, and the balance, if any, paid to the delinquent; provided, however, that the forfeiture and sale of the stock of any delinquent shall not release him from his original subscription; and such delinquent shall forfeit his right to vote at all meetings of the stockholders.

Jno. F. Love, Geo. A. Gray, Frost Torrence, J. M. Sloan and W. T. Rankin were then put in nomination for directors of the company, and the election ordered to be proceeded with by ballot under section 39 of the new corporation act. The poll having remained open for one hour the ballots were then counted, and it appearing that the said Jno. F. Love, Geo. A. Gray, Frost Torrence, J. M. Sloan and W. T. Rankin each received 3,830 votes for directors of the said corporation, the same being all the votes cast, they were thereupon declared unanimously elected such directors until the next annual election (the vote by which said directors were elected was the same vote recorded in adopting the report of Jno. F. Love and Geo. A. Gray).

There being no further business, on motion, the meeting adjourned.

W. T. RANKIN, Chairman.

FROST TORRENCE, Secretary.

153 **FIRST MEETING DIRECTORS OF THE LORAY MILLS.**

Gastonia, N. C., July 8th, 1901.

First meeting of the directors of the Loray Mills, held in the office of the Gastonia Banking Co., in the town of Gastonia, on the 8th day of July, 1901, six o'clock P. M., present Geo. A. Gray, Jno. F. Love, Frost Torrence and W. T. Rankin.

On motion, W. T. Rankin was called to the chair and Frost Torrence requested to act as secretary.

On motion, Geo. A. Gray was unanimously elected president, and Jno. F. Love secretary and treasurer of the corporation, to hold office until their successors are duly elected.

On motion, the directors' meeting adjourned.

W. T. RANKIN, Chairman.

FROST TORRENCE, Secretary.

Gastonia, N. C., July 11th, 1901.

The Board of Directors of the Loray Mills met this day, each director having first received three days' notice that this meeting would be held; *prest* Geo. A. Gray, Jno. F. Love, J. M. Sloan, W. T. Rankin and Frost Torrence.

On motion of Frost Torrence, the following resolution was unanimously adopted:

Resolved, That in the judgment of the Board of Directors of the Loray Mills, it is advisable and most for the benefit of the corporation, to-wit: The Loray Mills, that it should be dissolved, in order that the mill and manufacturing plant of the corporation may be completed and operated by a corporation organized with more liberal charter rights.

On motion of W. T. Rankin, the following further resolutions were adopted:

Resolved I., That notice of the adoption of the foregoing and above resolution be mailed, within ten days from the date hereof, by the secretary, to each stockholder of the corporation residing in the United States, to his or her last known postoffice address.

Resolved II., That a like notice, beginning within said ten days, be published in the Gastonia Gazette (a weekly newspaper, published in the county of Gaston), once a week for four successive weeks, of a meeting of the stockholders of said corporation, to be

154 held at the office of the corporation, to take action upon the resolution so adopted by said Board of Directors.

Resolved III., That the meeting of the stockholders above provided for be held on the 16th day of August, 1901, at 2:30 o'clock P. M., at the office of the company in the rooms of the Gastonia Banking Company, in the town of Gastonia, N. C.

Resolved IV., That the president and the secretary of the corporation be, and they are, hereby authorized to issue and publish all such notices as may be necessary for the purpose of carrying out the foregoing resolutions.

GEO. A. BRAY, President.

JNO. F. LOVE, Secretary.

Notice of a Meeting of the Stockholders of the Loray Mills.

Notice is hereby given that, at a meeting of the directors of the Loray Mills, held in the office of the mills, in the town of Gastonia, N. C., on the 11th day of July, 1901, the following resolution was unanimously adopted by the whole Board:

"Resolved, That in the judgement of the Board of Directors of the Loray Mills, it is advisable and most for the benefit of the corporation, to-wit, the Loray Mills, that it should be dissolved, in order that the mill and manufacturing plant of the corporation may be completed and operated by a corporation with more liberal charter rights."

A meeting of the stockholders of the Loray Mills is, therefore, hereby called, to be held at the office of the corporation, in the rooms of the Gastonia Banking Company, in the town of Gastonia, N. C., on the 16th day of August, 1901, at 2:30 o'clock P. M., to take action upon the foregoing and above quoted resolution, so adopted by the Board of Directors of said corporation, pursuant to the order of the Board and the provisions of section 34 of an act passed by the General Assembly of North Carolina (session 1901) entitled "An act to revise the corporation laws of North Carolina."

This, the 12th day of July, 1901.

GEO. A. GRAY, President.

JNO. F. LOVE, Secretary.

Gastonia, N. C., Aug. 16th, 1901.

Meeting of the stockholders of the Loray Mills, held at 2:30 P. M. to-day, at the office of the corporation in the rooms of the

155 Gastonia Banking Co., Gastonia, N. C., pursuant to due notice issued by Geo. A. Gray, president, and Jno. F. Love, secy., by order of the Board of Directors, at their meeting, July 11th, 1901.

On motion, W. T. Rankin was unanimously elected chairman of the meeting, and Frost Torrence was in like manner elected secretary.

On motion, Textile Mill Supply Co. (by A. J. Crampton), W. G. Neville and J. M. Sloan were appointed a committee to examine and report the number of shares of stock in said company represented either in person or by proxy:

Said committee reported 1,352 shares of stock represented in person, and 1,554 shares of stock represented by proxies; total, 2,906 shares of stock represented, as follows:

In person:

W. O. Sample, 10 shares.
Textile Mill supply Co., 150 shares.
E. W. Whitesides, 40 shares.
E. H. Adams, 20 shares.
T. Torrence, 50 shares.
W. T. Rankin, 20 shares.
Caleb Bradley, 30 shares.
W. G. Neville, 10 shares.
J. M. Sloan, 20 shares.
Geo. A. Gray and Jno. F. Love, 1,002 shares.
Total, 1,352 shares.

By proxies:

J. L. Falls, 10 shares, by F. Torrence, proxy.
W. J. Roddey, 10 shares, by W. T. Rankin, proxy.
Mrs. M. A. Pritchard, 5 shares, by W. G. Neville, proxy.
Nancy Aiken, 7 shares, by W. G. Neville, proxy.
J. L. Agurs, 100 shares, by Geo. A. Gray, proxy.
Lula M. Barr, 15 shares, by Jno. F. Love, proxy.
Woodward, Baldwin & Co., 500 shares, by Jno. F. Love, proxy.
Irvin Shupp, 50 shares, by Jno. F. Love, proxy.
Jno. McGill, 100 shares, by Jno. F. Love, proxy.
J. A. Dickey, 20 shares, by Jno. F. Love, proxy.
H. A. White, trustee, 50 shares, by Jno. F. Love, proxy.
John Harvey, Jr., 10 shares, by Jno. F. Love, proxy.
L. G. Dick, 20 shares, by Jno. F. Love, proxy.
W. T. Berry, 25 shares, by Jno. F. Love, proxy.
H. T. Whitin, 300 shares, by Jno. F. Love, proxy.

156 Mrs. J. J. Mitchell, Jr., 5 shares, by Jno. F. Love, proxy.
Mrs. M. A. Gould, 10 shares, by Jno. F. Love, proxy.
A. C. Lineberger, 100 shares, by Jno. F. Love, proxy.
S. Greene, 150 shares, by Jno. F. Love, proxy.
Whitride, White & Co., 5 shares, by Jno. F. Love, proxy.
E. E. Gillespie, 5 shares, by Jno. F. Love, proxy.
D. J. Currie, 9 shares, by Jno. F. Love, proxy.
Kate M. Wicker, 5 shares, by Jno. F. Love, proxy.
S. L. Morris, 15 shares, by Jno. F. Love, proxy.
Wm. E. McIlwaine, 20 shares, by Jno. F. Love, proxy.
W. A. Haffner, 8 shares, by E. H. Adams, proxy.
Total, 1,554 shares.

And it appearing from the report of said committee that more than two-thirds of all the stock subscribed for and issued by said corporation, to-wit, 2,906 shares, is represented either in person or by proxy, the chairman declared the meeting legally constituted and ready for the transaction of business.

Whereupon Geo. A. Gray, president, and Jno. F. Love, secretary, submitted the following report, which is inserted on the opposite page.

To the Stockholders of the Loray Mills:

We beg to submit to you, for your consideration, a statement of the affairs of the corporation on August 1st, 1901, as shown by the trail balance made by W. H. Herrick, accountant, and attached to this report and marked "Exhibit A."

It will be seen from this trial balance that the debts of the corporation, other than (capital stock), is $494,634.79.

This indebtedness is due to the persons named on this trial balance.

We submit also a statement made by the said accountant, marked "Exhibit B," which shows that it will require $264,125.25 additional to complete the mill with 25,000 spindles, so that the manufacture of goods may be begun.

This exhibit also shows that it will require $375,180.41 in addition to the sum heretofore mentioned to complete the mill up to its capacity of 50,000 spindles, so as to begin the manufacture of goods with that equipment.

It appears, therefore, that to pay the debts of the corporation heretofore contracted ($494,634.79) and to put in the mill an equipment of 25,000 spindles, will cost $758,760 04.

It further appears that, in order to put into the mill its full equipment of 50,000 spindles it will cost $1,133,940.45.

These estimated sums are in addition to the amount heretofore subscribed and paid by the stockholders, to-wit, $393,400.00.

157 It appears, therefore, that the stockholders of the corporation, in order to equip the mill up to 25,000 spindles and pay its debts, must raise $758,760.04.

And in order to put in the mill its full equipment of 50,000 spindles and pay its debts, the stockholders must raise $1,133,940.45.

We say frankly to the stockholders, that the great change that has taken place in the market for cotton goods since this enterprise was begun has produced such a condition of affairs that it is, in our opinion, not to be hoped that the stockholders can raise the capital necessary to complete this mill.

We, therefore, have applied to the larger creditors of the corporation and to those manufacturers of machinery who are interested therein for aid in this crisis of affairs of the company.

The result of our negotiations was the making of the contract or agreement, a copy of which is hereto attached and marked "Exhibit C."

The corporation mentioned in that agreement has been duly organized and now makes to your corporation the proposition contained in the paper hereto attached and marked "Exhibit D."

We append to this report an extract from the charter of the Maine corporation, with reference to the issuing of preferred stock and the rights of the holders of such stock, which copy is marked "Exhibit E."

We append to this report also, a statement made by the accountant, showing the creditors of your corporation that will be paid in full if the proposed arrangement is completed, and what creditors will accept preferred stock in the Maine corporation in settlement of their claims against your corporation.

If this arrangement is carried out, every dollar that your corporation owes will be paid at once, or as soon as the necessary transfers can be made and the final arrangements completed. Each one of you will receive a share of stock in the Maine corporation for every share of stock held by you in this corporation. The total common stock of the Maine corporation will not exceed $400,000.00, and the preferred stock will be $750,000.00, and will be sold only at par, and every dollar of the proceeds of the sale will be applied to the equipment of the mill.

We recommend to the stockholders the acceptance of this proposition, because we are fully satisfied that it is not in your power, in the present state of the market, and in the present condition of financial affairs to raise the money to carry on the great work which we have undertaken, and the plan proposed is the only one that seems to us to hold out any hope for the completion of the mill and its operation and for saving you what you have invested in this enterprise.

158 We are informed by the representatives of the Maine corporation, that each stockholder of the North Carolina corporation may have the privilege of purchasing at par shares of preferred stock in the Maine corporation up to the amount of the stockholders' holdings in the North Carolina corporation; that is to say, the stockholders of the North Carolina corporation have the privilege of investing in the preferred stock of the Maine corporation the same amount that they have invested in the North Carolina corporation, or any less amount.

We are also authorized to say to the stockholders that the Draper Company and the Whitin Machine Works, who have kindly consented to take a large amount of this preferred stock in payment for machinery to be furnished the mill, will sell $200,000.00 worth of that stock at par, on twelve months' credit, six per cent. interest, or any less amount, to anyone of the stockholders who desire to purchase, and will give reasonable security for compliance with his contract of purchase.

We make this statement to the stockholders because we deem it important that they should know that, whatever advantage, if any, those who furnish the money to complete the mill may take, under the proposed plan of operation, is open to them, if they choose to avail themselves of the opportunity, and that each one of you may become a holder of preferred stock in the corporation which proposes to complete and operate this mill.

We are, as you know, large stockholders, and looking to our own interests, we favor the acceptance of this offer of the Maine corporation, believing that this is the best plan that can be devised for the completion of the mill, and fearing, as we do, that disaster may come unless we accept the assistance offered us in this form.

It will be noted that the proposition of the Maine corporation is conditioned upon the statement of assets and liabilities dated July 1st.

It is proper to say here, that since this proposition was made, the Maine corporation have agreed to make the same proposition upon the statement of assets and liabilities dated August 1st, and submitted with this report; the same being "Exhibit A."

We deem it proper to state, in this connection, that the estimates made by the accountant, as to the cost of equipping the mill fully with 25,000 spindles or with 50,000 spindles, is an estimate only, and while we believe the same to be substantially correct, the result may show that it will require more or less than the sums named to accomplish the results indicated.

It is also true that the amount of the preferred stock, not to exceed $750,000.00 in the aggregate, may be apportioned among the several preferred stockholders in amounts somewhat different from those mentioned in the report of the auditor. The estimate of pre-

159 ferred stock to be taken by each one of the manufacturers, as stated in the report of the accountant, is believed by us to be substantially correct.

This, the 16th day of August, 1901.

GEO. A. GRAY, President.

JNO. F. LOVE, Treasurer.

Trial Balance, August 1, 1901.

Resources.

Real Estate	$489,527 48	
Machinery	389,574 26	
Interest	269 59	
Insurance	3,922 19	
Cash	4,741 27	$888,034 79

Liabilities.

Capital Stock	$393,400 00	
Bills Payable	23,792 63	
Woodward, Baldwin & Co., for new shares to be issued	5,000 00	
J. L. Bryan, cash Aug. 20th, 1900, for old shares issued	625 00	
Standard Oil Co., July 1, 1901	25 29	
U. S. Cast Iron Pipe & Foundry Co.	2,441 30	
Michigan Brass & Iron Works	1,302 23	
Saco & Pettee Machine Shops	33,404 80	
Jones & Laughlin	36,304 88	
B. F. Sturtevant Co.	10,846 55	
General Fire Ex. Co.	16,157 93	
Cohoes Iron Foundry & Machine Co.	11,495 00	
Whitin Machine Works	1,164 66	
Gree Fuel Economizer Co.	2,954 72	
Draper Co.	98,213 60	
Textile Mill Supply Co.	24,901 54	
C. & G. Cooper Co.	71,527 71	
Lockwood, Green & Co.	1,016 15	
Salem Foundry & Machine Shops	2,799 63	
Flynt Building & Construction Co.	150,511 17	
B. R. Smith, old stock to be issued	150 00	$888,034 79

WILLIAM H. HERRICK,
Accountant.

Aug. 12, 1901.

160 **List of Contracts not Completed, Partly Estimated.**

		2nd, 25,000 Spindles.	1st, 25,000 Spindles.
The Whitin Machine Works—			
Sept. 6, 1899, 1st installment			178,763 65
Feby. 20, 1900, 2nd installment		186,185 21	
Electric Uniform Time System, the American Watchman's Time Detector Co., 380–10 per cent			342 00
Kitson Machine Co., cotton blowing system			2,360 00
Kitson Machine Co., picking machinery, 1st installment			26,600 00
2nd installment		28,000 00	
Curtis & Marble Machine Co., 12 cloth room machines (may cut this ½) all.			4,684 00
The American Watchman's Time Detector Co., 15 station electric system, 294–10 per cent			264 60
The Draper Co., ½ Mill	129,000		
Credited on account	96,000		33,000 00
½ Mill		129,000 00	
The Carter & Gillespie Electric Co., incandescent electric lighting all			7,156 00
B. F. Sturtevant Co., 2 generators for electric lighting all			6,000 00
B. F. Sturtevant Co., picker, dust piping and fans, all			4,455 00
Saco & Pettee Machine Shops, 1st installment,	37,700		
Paid	10,000		
2nd installment		37,700 00	
$200,000 additional insurance placed before July 1, 1901, estimated at			500 00
		380,885 21	291,825 25

161	Deduct Saco & Pettee Machine Shops credited to them, see trial balance..	5,704 80	27,700 00
		375,180 41	264,125 25

Small additional estimate for Flynt Building & Construction Co. for the month of July, 1901; said estimate will be rendered by the engineers.

WILLIAM H. HERRICK,
Accountant.

Aug. 12, 1901.

Agreement by and between the Flynt Building & Construction Company et al.

This agreement made this day of A. D., 1901, by and between the Flynt Building & Construction Company, a duly organized corporation doing business at Palmer, Massachusetts; C. & G. Cooper Company, a duly organized corporation doing business at Mt. Vernon, Ohio, the Draper Company a duly organized corporation doing business at Hopedale, Massachusetts, Saco & Pettee Machine Shops, a duly organized corporation doing business at Newton, Massachusetts, Kitson Machine Company, a duly organized corporation doing business at Lowell Massachusetts, Jones & Laughlins, Limited, a duly organized corporation doing business at Pittsburg, Pennsylvania, General Fire Extinguisher Company, a duly organized corporation, doing business at Providence, R. I., Whitin Machine Works, a duly organized corporation doing business at Whitinsville, Massachusetts, Cohoes Iron Foundry and Machine Company, a duly organized corporation, doing business at Cohoes, N. Y., Salem Foundry and Machine Company, a duly organized corporation doing business at Salem, Massachusetts, and Woodward, Baldwin & Company, co-partners, doing business in New York City, N. Y.;

Witnesseth: Whereas, the ten parties first above mentioned have made sundry contracts with the Loray Mills, a corporation duly organized under the laws of North Carolina, for constructing and equipping a mill of fifty thousand spindles at Gastonia, North Carolina; and

Whereas, said Loray Mills is unable to pay for the completion of said contracts, and said Woodward, Baldwin & Company, selling agents of said Loray Mills, are interested in the completion of said mill as a mill of twenty-five thousand spindles.

162 The parties hereto agree with all the other parties and each party in consideration of the sum of one dollar and other sufficient consideration to said party paid, the receipt of which is hereby acknowledged, and also of the covenants of the other parties hereto, as follows:

A corporation shall be organized under the laws of Maine for the purpose of acquiring all the property and assets of said Loray Mills, with an authorized capital not exceeding $1,250,000, of which $750,000 shall be preferred stock of the par value of $100 per share, entitled to accumulative dividends at the rate of 6 per cent. per year; and, in addition to said 6 per cent., said preferred stock shall receive the same rate of dividend, if any, as is declared upon the common stock. In the distribution of the capital of the company, upon dissolution or otherwise, the preferred stock shall also be preferred to the extent of its par value and all accumulations of undeclared dividends. Each share of preferred stock shall have the same voting power as a share of common stock.

As soon as the issue of said preferred stock is authorized, said Woodward, Baldwin & Co. agree to subscribe for 500 shares of said preferred stock and to pay for the same in cash at the par value thereof, and further agree that they will loan, or cause to be loaned to the treasurer of said new company the sum of about $100,000 upon the note or notes of said new corporation bearing interest at per cent. per annum. One thousand (1,000) shares of said preferred stock shall be set apart for the payment of said note; and said Woodward, Baldwin & Company or said Loray Mills shall dispose of said one thousand (1,000) shares of said preferred stock at par at such times and in such amounts as they shall be able, and pay in the proceeds to the holder of said notes.

The treasurer of the Loray Mills shall hold the remainder of said perferred stock above said 1,500 shares in the treasury to be issued from time to time at its par value in payment of the accounts rendered by said first mentioned ten parties under their aforesaid contracts with said Loray Mills; and said ten parties agree to proceed to fulfil and perform their said contracts in the manner following and to accept such preferred stock at par in payment of their accounts in the manner following and with the exceptions hereinafter noted, to-wit:

Said Flynt Building & Construction Company herebt agrees to carry out its contract and to accept and receive in full payment therefor preferred stock up to the amount of $1,000,000, the balance (if any) to be paid in cash.

Said C. & G. Cooper Company, Jones & Laghlins, Limited, General Fire Extinguisher Company and Salem Foundry and Machine Company, agree to carry out their contracts for equipping the mill, as

163 built, and to accept and receive preferred stock at par in full payment of their accounts.

Said Draper Company, Saco & Pattee Machine Works, Kitson Machine Company, Whitin Machine Company and Cohoes Iron Foundry & Machine Company agree to carry out their contracts so far as is necessary for fitting out and equipping a mill of twenty-five thousand spindles (instead of a mill of fifty thousand spindles), and to accept and receive preferred stock at par in full payment of their accounts.

This agreement shall be binding upon no one of the eleven parties mentioned at the beginning of said agreement until all of such parties have signed, whereupon said agreement shall be in full force and effect.

In testimony whereof, the above named parties have hereunto set their hands the day and year first above written.

DRAPER COMPANY,
By GEO. A. DRAPER, Treas.

THE WHITIN MACHINE WORKS,
G. W. WHITIN, Treas.

FLYNT BUILDING & CONST. CO.,
A. T. WING, Gen'l Mgr.

THE C. & G. COOPER CO.,
F. L. FAIRCHILD, Prest.

SALEM FOUNDRY & MACHINE SHOP,
CHAS. F. CURRWELL, Prop.

THE COHOES IRON FDY. & MACHINE CO.,
D. S. JACKSON, Treas.

SACO & PETTEE MACHINE SHOPS,
By R. P. SNELLING, Treas.

GENERAL FIRE EXTINGUISHER CO.,
By FEDERICK GRINNELL, Prest.

JONES & LAUGHLIN, LIM.,
By GEO. P. BULLARD.

KITSON MACHINE CO.,
By H. C. PERHAM, Treas.

164 In signing this agreement we understand the clause "the sum of about one hundred thousand dollars $100,000," to mean that we will loan or cause to be loaned at least fifty thousand dollars, $50,000, and that the treasury stock after the bills of said ten parties have been paid and our stock taken will be five hundred shares or more preferred stock.

WOODWARD, BALDWIN & CO.

Proposition of the Loray Mills of Maine to the Loray Mills of North Carolina.

To the Loray Mills of North Carolina:

The Loray Mills of Maine, a corporation, makes to the Loray Mills of North Carolina the following proposition: It will purchase from the Loray Mills of North Carolina, the following property of said Loray Mills, to-wit: All the property of the Loray Mills of North Carolina, real and personal and mixed, including real estate, lands, buildings, mill privileges and machinery, tools, special tools, patterns, drawings, letters patent of the United States and of foreign countries, and all rights in, to or under such patents, and rights to *do* or interest in inventions or applications for patents and any patents hereafter issued, together with the entire business of the Loray Mills of North Carolina, and the good will thereof, and all stock on hand, manufactured, unmanufactured, or in process, all cash on hand or on deposit, and all choses in action, including, all claims and demands for any past infringement of letters patent; also all book debts and accounts, accounts receivable, notes and other evidences of indebtedness, and all contracts or agreements of the Loray Mills of North Carolina, or the beneficial interest thereunder, and all rights or benefits to accrue to the Loray Mills of North Carolina under such contracts or agreements, and all other property of the Loray Mills of North Carolina, of whatever name, nature and description, subject, however, to all the contracts and other obligations of the Loray Mills of North Carolina, and all its debts and liabilities; and pay for the aforesaid property of the Loray Mills of North Carolina three thousand nine hundred and thirty-two shares of its common stock, said shares to be non-assessable and fully paid by the transfer to this company of the foregoing property of the Loray Mills of North Carolina, the bona fide and fair valuation of the same being the equivalent of said stock at par; providing that, as part of the transfer of the aforesaid property, the stockholders of the Loray

165 Mills of North Carolina assign to the order of this company their shares of stock in the Loray Mills of North Carolina.

That the before mentioned three thousand nine hundred and thirty-two shares of common stock of this company be paid and delivered simultaneously with the execution of proper instruments transferring all the property of the Loray Mills of North Carolina to this Company, as aforesaid, and that said shares of the common stock of this company be issued and delivered by this company to such person and in such manner as the Loray Mills of North Carolina shall direct to be held by them for the benefit of the Loray Mills of North Carolina and its stockholders, and to be distributed by them among the stockholders of the Loray Mills of North Carolina as and when the stockholders of that Company assign to the order of this Company their shares of stock in the Loray Mills of North Carolina.

The foregoing proposition is made upon the understanding and condition that the assets and liabilities of the Loray Mills of North Carolina are as follows:

July 1st, 1901.

THE LORAY MILLS.

Resources.

Real estate	$488,874.11	
Machinery	371,934.48	
Interest	28.25	
Insurance	3,922.19	
General Fire Extinguisher Co	1,714.33	
Cash in bank	889.49	
Total		$867,362.85

166 Liabilities.

Bills payable	$24,168.36
Standard Oil Co	25.29
U. S. Cast Iron P. & Foundry Co	3,000.00
Michigan Brass & Iron Works	1,302.23
Saco & Pettee Mch. Shops	33,404.80
Jones & Laughlin	33,404.80
Jones & Laughlin	36,304.88
B. F. Sturtevant Co	10,846.55
Cohoes I. F. & Mach. Shops	11,495.00
Whitin Machine Shops	1,164.66
Green Fuel Economizer Co	2,954.72
Draper Co	98,213.60
Textile Mills Supply Co	24,901.54
C. & G. Cooper Co	71,527.71
Lockwood, Greene & Co	767.71
Salem Foundry & Mch. Shop	2,799.63
Flynt Building & C. Co	150,511.17
J. L. Bryan	625.00
B. R. Smith	150.00
Stock issued	393,200.00
	$867,362.85

The above proposition is further made upon the condition that it is accepted by the Loray Mills of North Carolina on or before September 1st, next.

(Signed.) LORAY MILLS,
By ALBERTON LYON, President.

August 13, 1901. Hereunto duly authorized.

ARTICLE VIII.—Capital Stock.

The capital stock of this corporation shall be one million, two hundred and fifty thousand dollars, divided into twelve thousand and five hundred shares of the par value of one hundred dollars per share, of which seven thousand five hundred shares, having a total par value of seven hundred and fifty thousand dollars, shall be preferred stock and five thousand shares, having a total par value of five hundred thousand dollars, shall be common stock. Said seven thousand and five hundred shares of perferred stock shall be entitled from and after the first of the month next after its issue to a cumulative preferred dividend of six per centum per annum out of the net

167 earnings of the corporation, payable at such times and in such instalments as may be determined by the Board of Directors, before any payment is made to the holders of the common stock. If, after payment in any year of such six per cent dividend upon the preferred stock and all dividends at said rate of said preferred stock unpaid in previous years there is a surplus remaining from the net profits of the Company after the establishment and maintenance of such reserves as the Directors deem necessary for the proper management of said Company, such surplus shall be divided pro rata between the preferred and common stock, each share of stock, whether preferred or common, to receive the same dividend. In the distribution of the capital of the Company upon dissolution or liquidation the preferred stockholders shall first be paid in full the par value of their stock, together with all accumulations of unpaid dividends. If there be any proceeds remaining from such dissolution or liquidation after the payment of the preferred stock, and accumulated dividends it shall be applied to the payment of the coomon stock, and if there still shall be any surplus of assets from such dissolution or liquidation after the payment of the common stock in full it shall be divided pro rata between the preferred and common stock.

Each share of preferred stock shall have the same voting power as a share of common stock.

List of Creditors to be Given Preferred Stock Under Agreement.

Saco & Pettee Machine Shops	$33,404 80
General Fire Ex. Co	16,157 93
Salem Foundry & Machine Shops	2,799 63
Draper Co	130,000 00
Kitson Machine Co	28,960 00
Jones & Laughlin	36,304 88
Cohoes Iron Foundry & Machine Co	11,495 00
C. & G. Cooper Co	71,527 71
Whitin Machine Works	180,000 00
Flynt Building & Construction Co	100,000 00
	$610,649 95

168 **List of Creditors to be Paid in Cash.**

Flynt Building & Construction Co.....	$51,000 00	
B. F. Sturtevant Co.....	21,301 55	
U. S. Cast Iron Pipe & Foundry Co.....	2,441 30	
Michigan Brass & Iron Works.....	1,302 23	
Bills payable $23,792.63 less $4,000.00 pd. Aug. 6th.....	19,792 63	
Green Fuel Economizer Co.....	2,954 72	
Textile Mill Supply Co.....	24,901 54	
Lockwood, Greene & Co.....	1,016 15	
The American Watchman's Fire Detector Co.....	606 60	
Curtis & Marble Machine Co.....	4,684 00	
The Carter & Gillespie Electric Co.....	7,156 00	
Estimate on $200,000 insurance.....	500 00	
	$137,656 72	
Add for freights.....	10,000 00	
Add for contingencies.....	7,000 00	
	$154,656 72	
Add	610,649 95	
		$765,306 67
Preferred stock..... $750,000		
Pd. by Woodward, Baldwin & Co..... 5,000		
	$745,000	
To be issued to creditors.....	600,000	
To be issued to Woodward Baldwin & Co. for cash.....	145,000	

Aug. 12, 1901. WILLIAM H. HERRICK,
Accountant.

Resolution to Dissolve Corporation, and Stock Vote.

Whereupon Frost Torrence offered the following resolutions:

Resolved, that the *affirs* of the corporation are in such condition,

169 as appears by the report of the president and treasurer, that a dissolution thereof seems necessary for the best interests of the stockholders, and the stockholders do, therefore, vote that the corporation be dissolved, and the directors are authorized to take such steps as in their judgment, will best carry out the wishes of the stockholders thus expressed.

Resolved, that the best interests of the stockholders require that the proposition made by the corporation known as the Loray Mills, organized under the laws of the State of Maine, as set our in the report of the president and treasurer, be accepted, and the president and treasurer are hereby authorized and empowered to carry out the details of the proposed settlement and to execute all such deeds and other instruments in the name of this corporation and under its seal as will effectuate the purpose of the stockholders, thus expressed.

Resolved, that the president and treasurer report their action in the premises to this meeting, which is adjourned until Saturday, the 31st day of August, 1901, at 2 P. M., when the meeting will convene to hear the report of the said president and treasurer.

On motion of W. G. Neville, seconded by Textile Mill Supply Co. (by P. L. McMahon) the foregoing resolutions were unanimously accepted, adopted and approved as is shown by the following stock vote:

A. C. Lineberger, 100 shares by Jno. F. Love, proxy vote yes.
J. L. Agurs, 100 shares by Geo. A. Gray, proxy vote yes.
H. A. White, trustee, 50 shares by Jno. F. Love, proxy vote yes.
E. E. Gillespie, 5 shares by Jno. F. Love, proxy vote yes.
Kate M. Wicker, 5 shares by Jno. F. Love, proxy vote yes.
Whitride, White & Co., 5 shares by Jno. F. Love, proxy vote yes.
Caleb Bradley, 30 shares, in person, vote yes.
H. T. Whitin, 300 shares by Jno. F. Love, proxy vote yes.
Nancy Aiken, 7 shares, by W. G. Neville, proxy vote yes.
S. L. Morris, 15 shares, by Jno. F. Love, proxy vote yes.
Wm. E. McIlwaine, 20 shares, by Jno. F. Love, proxy vote yes.
W. T. Rankin, 20 shares, in person, vote yes.
E. Whitesides, 40 shares, in person, vote yes.
J. A. Dickey, 20 shares, by Jno. F. Love, proxy vote yes.
L. G. Dick, 20 shares, by Jno. F. Love, proxy vote yes.
Lula M. Barr, 15 shares, by Jno. F. Love, proxy vote yes.

170 Woodward, Baldwin & Co., 500 shares, by Jno. F. Love, proxy vote yes.
W. J. Roddey, 10 shares, by W. T. Rankin, proxy vote yes.
W. A. Haffner, 8 shares, by E. H. Adams, proxy vote yes.
Jno. Harver, Jr., 10 shares, by Jno. F. Love, proxy vote yes.
Frost Torrence, 50 shares, in person vote yes.
W. T. Berry, 25 shares, by Jno. T. Love, proxy vote yes.
W. O. Sample, 10 shares, in person, vote yes.
Jno. McGill, 100 shares, by Jno. F. Love, proxy vote yes.
Irvin Shupp, 50 shares, by Jno. F. Love, proxy vote yes.
J. M. Sloan, 20 shares, in person, proxy vote yes.
Geo. A. Gray and Jno. F. Love, 1,002 shares, in person, vote yes.
Mrs. Jno. J. Mitchell, Jr., 5 shares, by Jno. F. Love, proxy vote yes.
Mrs. M. A. Gould, 10 shares, by Jno. F. Love, proxy vote yes.
D. J. Currie, 9 shares, by Jno. F. Love, proxy vote yes.
Mrs. M. A. Pritchard, 5 shares, by W. G. Neville, proxy vote yes.
W. G. Neville, 10 shares, in person, vote yes.
Stephen Greene, 150 shares, by Jno. F. Love, proxy vote yes.
Textile Mill Supply Co., by P. H. McMahon, 150 shares, in person, vote yes.
J. L. Falls, 10 shares, by Frost Torrence, proxy vote yes.
E. H. Adams, 20 shares, in person, vote yes.
Total vote, 2,906 shares, yes.

There being no further business, on motion the meeting adjourned to meet again at 2 P. M., Saturday, the 31st day of August, 1901.

W. R. RANKIN, Chairman.
FROST TORRENCE, Secretary.

171 **LETTER OF SEPT. 10, 1900.**

Vicksburg, Miss., Sept. 10th, 1900.

Mr. Geo. A. Gray,
Gastonia, N. C.

Dear Sir:

Your favor of Sept. 1st to our Yazoo office has been referred here for answering. The writer has just returned after an absence of several months and found your letter unanswered.

We have taken the matter up this day with the other members of our firm and will let you know in the next few days just what we will do in regard to taking the $100,000 worth of stock in the Loray Mafg. Co. We will state that if the different corporations referred to in your letter as well as the Loray Mfg. Co., will bind themselves to buy their cotton from us for a period of years, we will take the $100,000 in the Loray Mfg. Co.

We have considerable money lying idle that we do not need in our business and are at all times looking for good investments, but $100,000.00 is a larger amount than we have ever put in one enterprise. If we can see a fair return in the way of dividends from the stock of this mill and to business for our cotton end we will not hesitate to go into it.

As stated above we have taken the matter up with the other members of our firm and will communicate with you in the next few days.

If you think that the matter can be arranged on the lines as indicated above, the writer will go to Gastonia at once and perfect such arrangements in writing as will be necessary.

In getting a corporation to make a contract of this nature we would, of course, bind ourselves to furnish such cotton at a fair market price, adding a legitimate profit, but not an excessive one. On the other hand we would open an office at Gastonia and would endeavor to finance all the cotton purchases of all the corporations.

We would be obliged if you would communicate further with us in regard to this matter.

Yours very truly,

Dict. W. C. CRAIG & CO.

172 **TELEGRAM OF FEB. 4, 1901.**

Feby. 4th, 1901.

John F. Love,
Gastonia, N. C.

When do you expect to organize and elect officers for the Loray? Answer.

W. L. WELLS.

TELEGRAM OF FEB. 14, 1900.

Gastonia, N. C., Feb. 14—00.

W. L. Wells,
Vicksburg.

Letter just received. Buy cotton mentioned quick.

JNO. F. LOVE, V. P.

COPY OF LETTER PAGE 697, BOOK NO. 3.

Vicksburg, Miss., Feby. 23rd, 1900.

Mr. John F. Love, V. P.,
Gastonia, N. C.

Dear Sir:

Enclosed please find invoice of 324 bales marked PIK-E, amounting to $14,127.00. Against this invoice we beg to advise our sight draft with B-L attached, for like amount, which please pay on presentation, and oblige.

We bought 250 bales in one lot from a Jew friend of ours to go on this order, but have succeeded in having delivered only 157 bales, leaving about 100 yet to be delivered. We hope to have the balance delivered in the next few days, but owing to the advance in the market and the characteristics of "God's chosen people," we are afraid that we will not succeed in getting all of it. Whatever we get, if any, we will let come along next week.

By the way, what has become of those "town bonds?" Have they ever *ben* printed? We have not seen any of the proceeds, and are

about to starve to death. If there is any trouble about selling
173 them, send them to us, and we will try our hand on them.

Yours very truly,

J. T. W. (Enc.) W. L. WELLS CO.

COPY OF TELEGRAM.

Gastonia, N. C., Sept. 12, 1900.

The W. L. Wells Co.,
Vicksburg.

We are anxious to see Mr. Wells as soon as possible and arrange our business matters when will he be here? Answer.

JOHN F. LOVE, Treasr.

LETTER OF NOV. 21, 1900.

Vicksburg, Miss., Nov. 21st, 1900.

John F. Love, Esq.,
Gastonia, N. C.

Dear Mr. Love :—

Yours of the 19th enclosing N. Y. check for $25,000.00 received, for which accept thanks.

We have about brought our Jew friend around, and there seems now no doubt about our getting the 400 bales. Have secured a beautiful lot for Avon in Greenwood, which will be shipped in a few days. Also a lot of 200 bales from a point in Arkansas for Avon, which we presume we will get. We bought this lot on same basis as the 250 bales, 11c., but the big rise in the market makes us uncertain about it until we have got it. You know you can't risk all cotton buyers. The Greenwood lot is 118 bales and cost 11 1-4 landed, but it is very fine staple. We are working like beavers for you, and think we have done you good service the past ten days. Look out for a jump in the marker, and my advice would be not to sell any goods right now. I believe the market will go a cent higher.

Please reimburse us as fast as possible, as cotton runs into money at an alarming rate, and to be heavily overdrawn naturally makes us timid about buying.

Yours,

W. L. WELLS.

174 **COPY OF LETTER PAGE 288, BOOK NO. 4.**

Vicksburg, Miss., Jan. 2nd, 1901.

Mr. John F. Love, Treas.,
Gastonia, N. C.

Dear Sir:

We have yours of the 31st ult. and have credited your account with the 5c. per cwt. overcharge on the 50 bales MOH, $13.03.

By the way, what about paying for some cotton? Certainly most, if not all, of our shipments since the middle of November have arrived, and we see no reason why we should not be paid according to the understanding. We don't call to mind an instance in our experience where we have worked harder to secure a lot of cotton than we did in these purchases for you, and of course we feel that we are entitled to as prompt a reimbursement as it is possible for you to make.

Yours very truly,

W. L. W. W. L. WELLS CO.

LETTER OF AUG. 12, 1901.

Vicksburg, Miss., Aug. 12th, 1901.

Mr. John F. Love,
Gastonia, N. C.

Dear Sir:—

Herein we beg to hand you statements of accounts of the Gastonia Cotton Mfg. Co. and Avon Mills, with interest at 6 per cent calculated to August 15th, 1901. The interest on all charges has been calculated at thirty days from the date shipments were made, and on all credits from the day the money was received by us.

Please check over these statements in order that they may be verified by you when our Mr. W. L. Wells arrives there the latter part of this week. As you are aware, our firm will be dissolved on September 1st, and it will be necessary to have this matter closed prior to that date.

Yours very truly,

W. L. WELLS CO.

J. T. W.

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SECOND EXCEPTION.

The testimony in the case here closed and the defendant thereupon renewed its motion to dismiss the complaint or for judgement as in case of nonsuit, under the acts of assembly of the State of North Carolina above recited.

The motion was overruled and the defendant then and there, while the jury were still at bar, duly excepted, and prayed that this bill of exceptions might be signed and sealed, and it is signed and sealed accordingly.

JAS. E. BOYD, [SEAL.]
United States Judge.

THIRD EXCEPTION.

The defendant then moved to dismiss the action, for want of jurisdiction in the court, upon the grounds which were assigned at the close of the plaintiff's testimony, the plaintiff not being a citizen of a State different from that of the defendant.

The motion was overruled and the defendant then and there, while the jury were still at the bar, excepted, and prayed that this bill of exceptions might be signed and sealed, and it is signed and sealed accordingly.

JAS. E. BOYD, [SEAL.]
United States Judge.

FOURTH EXCEPTION.

The court charged the jury that, upon the evidence in the case, the first issue should be answered "yes," and directed the jury so to answer that issue.

The defendant, in open court, and while the jury were still at the bar, duly excepted to this charge of the court, and prayed that this bill of exceptions might be signed and sealed, and it is signed and sealed, accordingly.

JAS. E. BOYD, [SEAL.]
United States Judge.

FIFTH EXCEPTION.

The court charged the jury that, upon the evidence, the second issue should be answered "yes," and directed the jury so to answer that issue.

176 Defendant, in open court, and while the jury were still at the bar, excepted to this charge of the court, and prayed that this bill of exceptions might be signed and sealed, and it is signed and sealed accordingly.

JAS. E. BOYD, [SEAL.]
United States Judge.

SIXTH EXCEPTION.

The court charged the jury that, upon the evidence, the third issue should be answered "yes," and that plaintiff was entitled to recover the full amount demanded in the complaint, with interest, and directed the jury to answer the issue accordingly.

The defendant, in open court, and while the jury were still at the bar, excepted to this charge of the court and prayed that this bill of exceptions might be signed and sealed, and it is signed and sealed accordingly.

JAS. E. BOYD, [SEAL.]
United States Judge.

ALLOWANCE OF BILL OF EXCEPTIONS.

The jury answered the issues, by their verdict, in accordance with the instructions of the court, and the same will be found entered in the record.

The foregoing exceptions were duly taken at the trial of this civil action, and were allowed by the court, all of which was done in open court and while the jury were at the bar, and, inasmuch as the matters aforesaid do not appear by the record of the verdict aforesaid, the defendant, the Gastonia Cotton Manufacturing Company, by its counsel and attorneys, Chas. Price and Amistead Burwell, Platt D. Walker and Edwin T. Cansler, of the said firm of Burwell, Walker & Cansler, prayed that the district judge, presiding at said trial in the Circuit Court, would set his hand and seal to this bill of exceptions, time to present the former bill of exceptions having been extended, by consent of the parties and the order of the court, at the trial, for ninety days from the 20th day of June, 1902, and, thereupon, on this, the 28th day of August, 1902, the said Jas. E. Boyd, district judge, who presided at the trial of the case in the Circuit Court, did set his hand and seal hereto as of the 20th day of June, 1902, the day on which the trial was had and concluded and the exceptions entered, all of which was done in accordance with the statute in such

177 cases made and provided and the course and practice of the court, and this bill of exceptions is ordered to be made a part of the record in this cause.

JAS. E. BOYD, [SEAL.]
United States Judge.

Filed in this office August 28th, 1902.

H. C. COWLES, Clerk.

ASSIGNMENT OF ERRORS.

UNITED STATES OF AMERICA, IN THE CIRCUIT COURT FOR THE FOURTH CIRCUIT, WESTERN DISTRICT OF NORTH CAROLINA—AT LAW.

Gastonia Cotton Manufacturing Company,
Plaintiff in Error,
vs.
W. L. Wells Company,
Defendant in Error.

Afterwards, to-wit, on the 28th day of August, 1902, comes the said Gastonia Cotton Manufacturing Company, the plaintiff in error, by its said attorneys, Chas. Price and Burwell, Walker and Cansler, and says that, in the record and proceedings aforesaid there is manifest error in the following respects, to-wit: In the rulings of the presiding judge during the progress of the trial, and in the refusal to grant the motion submitted by the defendant in the court below, the plaintiff in error in this court, and in the charge or instructions of the court to the jury, and the said plaintiff in error more *practically* alleges as error committed by the court the following:

1. That the court erred in refusing the motion of the defendant in the court below, plaintiff in error in this court, to dismiss the action for the want of jurisdiction in the Circuit Court and for the reasons stated in its first and third bill of exceptions.

The plaintiff in error in due time excepted to the ruling of the court and now assigns the same as error.

2. That the court erred in refusing to grant the motion of the defendant in the court below, the plaintiff in error in this court, to dismiss the complaint, or for judgement as in case of non-suit, under the statute of North Carolina, as set forth in its second bill of exceptions.

178 The plaintiff in error in due time excepted to the said ruling of the court, and now assigns the same as error.

3. That the court refused to grant the motion of the defendant in the court below, the plaintiff in error in this court, to dismiss the motion for want of jurisdiction in the Circuit Court, which motion was made at the close of the testimony in the case and is set forth in the third bill of exceptions.

The plaintiff in error in due time excepted to this ruling of the court, and now assigns the same as error.

4. That the court charged and directed the jury to answer the first issue "yes."

The plaintiff in error in due time excepted to this charge and direction, and now assigns the same as error.

5. That the court charged and directed the jury to answer the second issue "yes."

The plaintiff in error in due time excepted to this charge and direction of the court, and now assigns the same as error.

6. The court charged the jury that, upon the evidence, the third issue should be answered "yes," and that the plaintiff in the court below was entitled to recover the full amount demanded in the complaint and directed the jury to answer the issue accordingly.

The plaintiff in error in due time excepted to this charge and direction of the court, and now assigns the same as error.

Wherefore, the said Gastonia Cotton Manufacturing Company, because of the errors aforesaid, prays that the said judgement of the Circuit Court of the United States may be reviewed, reversed, annulled and altogether held for naught, and that the plaintiff in error may be restored to all things which it has lost by occasion of the said judgement and may have such other and further relief as may be proper in the premises.

This, the 28th day of August, 1902.

CHAS. PRICE,
BURWELL, WALKER & CANSLER,
Attorneys for Plaintiff in Error.

Endorsed:

Filed in my office this, the 28th day of August, 1902.

H. C. COWLES,
Clerk of the United States Circuit Court.

179 **SUPERSEDEAS BOND.**

UNITED STATES OF AMERICA, CIRCUIT COURT OF THE UNITED STATES FOR THE FOURTH CIRCUIT AND WESTERN DISTRICT OF NORTH CAROLINA—AT CHARLOTTE.

JUNE TERM, 1902.

Gastonia Cotton Manufacturing Company, Plaintiff in Error, *vs.* W. L. Wells Company, Defendant in Error. } At Law.

Know all men by these presents, that we, the Gastonia Cotton Manufacturing Company, as principal, and Jno. F. Love, Geo. A. Gray, R. C. G. Love and Edgar Love, as sureties, are held and firmly bound unto Wells Company in the full and just sum of forty-five thousand dollars, to be paid to W. L. Wells Company, their certain heirs, executors, administrators or assigns: to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, and firmly by these presents.

Sealed with our seals and dated this, the 8th day of August, in the year of our Lord, nineteen hundred and two.

Whereas, lately, at a June term, 1902, of the Circuit Court of the United States for the Western District of North Carolina, in a suit depending in said court between W. L. Wells Company, plaintiffs, and Gastonia Cotton Manufacturing Company, defendant, a judgement was rendered against the said Gastonia Cotton Manufacturing Company for the sum of $39,313.88 and interest on $35,397.00 until paid, and the costs of action, as by said judgement will appear, and the said, the Gastonia Cotton Manufacturing Company, having obtained a writ of error, and filed a copy thereof in the clerk's office of said court, to reverse the judgement in the aforesaid suit, and also a citation directed to W. L. Wells Company, citing and admonishing them to be and appear at the United States Circuit Court of Appeals, for the Fourth Circuit, to be holden at Richmond, in the State of Virginia, on the day in the said citation mentioned; and whereas the penalty of the supersedeas bond to be given by the plaintiff in error, the Gastonia Cotton Manufacturing Company, was fixed by the court at the sum of forty-five thousand dollars, as will appear by the order of the court entered on the record.

Now, the *consideration* of the above obligation is such that, if the said Gastonia Cotton Manufacturing Company shall prosecute the

180 said writ of error to effect, and shall pay said debt to remain in full force and virtue.

GASTONIA COTTON M'F'G CO.,
By GEO. A. GRAY.
GEO. A. GRAY, [SEAL.]
JNO. F. LOVE, [SEAL.]
R. C. G. LOVE, [SEAL.]
EDGAR LOVE, [SEAL.]

[Seal of the Gastonia Manufacturing Co.]

STATE OF NORTH CAROLINA, }
County of Gaston. }

Personally appeared before me, W. T. Rankin, a notary public, duly commissioned and acting in and for the town of Gastonia, county of Gaston, and State aforesaid, Geo. A. Gray, Jno. F. Love, R. C. G. Love, to me known to be the persons whose names appear as sureties on the foregoing bond, and each of them acknowledged the due execution of the said bond by himself, and, being duly sworn, each for himself, says that he is worth the sum of forty-five thousand dollars over and above the exemptions allowed by the laws of the St-te of North Carolina, and over and above all liabilities.

GEO. A. GRAY,
JNO. F. LOVE,
R. C. G. LOVE.

Sworn to and subscribed before me this, the 5th day of August, 1902.

W. T. RANKIN,
Notary Public.

[Notarial Seal.]

STATE OF NORTH CAROLINA, }
County of Gaston. }

Personally appeared before me, W. T. Rankin, a notary public, duly commissioned and acting in and for the town of Gastonia, county of Gaston and State aforesaid, Edgar Love, to me known to be one of the persons whose names appear on the foregoing bond, and acknowledged the due execution of the said bond by himself, and, being duly sworn, says that he is worth the sum of twenty

181 thousand dollars over and above the exemptions allowed by the laws of the State of North Carolina, and over and above all liabilities.

EDGAR LOVE.

Sworn to and subscribed before me this, the 5th day of August, 1902.

W. T. RANKIN,
Notary Public.

[Notarial Seal.]

We consent, as counsel of record for the defendant in error, W. L. Wells Company, that the foregoing supersedeas bond may be filed at any time before the writ of error and citation are allowed and issued, with the same effect as if the said writ of error and citation had been allowed and issued at the time the supersedeas bond was filed.

JONES & TILLETT,
Attorneys for W. L. Wells Co., Defendant in Error.

UNITED STATES CIRCUIT COURT,
Western District of North Carolina.

The foregoing supersedeas bond having been presented to me, and the same appearing sufficient in all respects, I, therefore, approve the same and direct that the said bond be filed and operate as a supersedeas bond in the case of the Gastonia Cotton Manufacturing Company, plaintiff in error, *vs.* W. L. Wells Company, defendant in error.

This, the 28th day of August, 1902.

JAS. E. BOYD,
United States Judge.

Endorsed:

Filed in my office this 28th day of August, 1902.

H. C. COWLES,
Clerk United States Circuit Court.

182 **BOND FOR COSTS.**

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

Gastonia Cotton Manufacturing Company Plaintiff in Error. *versus* W. L. Wells Company, Defendant in Error.	June Term, 1902, At Charlotte, N. C.

Know All Men by These Presents, that we, Gastonia Cotton Manufacturing Company, a corporation duly created and organized, as principal, and Geo. A. Gray and Jno. F. Love, as sureties, are held and firmly bound unto W. L. Wells Company in the full and just sum of three hundred dollars, to be paid to the said W. L. Wells Company, and Geo. A. Gray and Jno. F. Love, as sureties, are held and firmly bound unto W. L. Wells Company in the full aus just sum of three hundred dollars, to be paid to the said W. L. Wells Company, their certain attorneys, executors, administrators or assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, by these presents. Sealed with our seals and dated this, the 5th day of August, in the year of our Lord, one thousand, nine hundred and two.

Whereas, lately, at a Circuit Court of the United States for the Western District of North Carolina, held at Charlotte, North Carolina, in a suit, depending in said court between W. L. Wells Company, plaintiff, and the Gastonia Cotton Manufacturing Company, defendant, a judgement was rendered against the said Gastonia Cotton Manufacturing Company; and, whereas the said Gastonia Cotton Manufacturing Company has obtained a writ of error and filed a copy thereof in the Clerk's office of the said Court to reverse the judgement in the aforesaid suit or civil action, and a citation has been directed to the said W. L. Wells Company, citing and admonishing them to be and appear at the United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond, Virginia, on the day named in said citation;

Now, the condition of the above obligation is such that, if the Gadtonia Cotton Manufacturing Company shall prosecute said writ of error to effect and answer and pay all costs if its fail to make its plea good, then the above obligation to be void, else to remain in full force and virtue.

GASTONIA COTTON M'F'G CO.
By GEO. A. GRAY, President,
GEO. A. GRAY, [Seal.]
JNO. F. LOVE, [Seal.]

[Seal of the Gastonia Manufacturing Company.]

183 STATE OF NORTH CAROLINA, }
County of Gaston. }

Personally appeared before me, W. T. Rankin, a notary public, duly commissioned and acting in and for the town of Gastonia, county of Gaston and State aforesaid, Geo. A. Gray and Jno. F. Love, to me known to be the persons whose names appear as sureties on the foregoing bond, and each of them acknowledged the due execution of the said bond by himself, and, being duly sworn, each for himself, says that he is worth the sum of three hundred dollars over and above the exeemptions allowed by the laws of the State of North Carolina and over and above all liabilities.

GEO. A. GRAY,
JNO. F. LOVE.

Sworn to and subscribed before me this the 5th day of August, 1902.

[Notarial Seal.]

W. T. RANKIN,
Notary Public.

We consent, as counsel of record for the defendant in error, W. L. Wells Company, that the foregoing cost bond may be filed at any time before the writ of error and citation are allowed and issued, with the same effect as if the said writ of error and citation had been allowed and issued at the time the cost bond was filed.

JONES & TILLETT,
Attorneys for W. L. Wells Company,
Defendant in Error.

UNITED STATES CIRCUIT COURT, WESTERN DISTRICT OF NORTH CAROLINA.

The foregoing cost bond having been presented to me, and the same appearing sufficient in all respects, I, therefore, approve the same and direct that it be filed as the cost bond in this case.

This, the 28th day of August, 1902.

JAS. E. BOYD,
United States Judge.

Endorsed:

Filed in *k*y office, this, the 28 day of August, 1902.

H. C. COWLES,
Clerk United States Circuit Court.

184 **OPINION OF THE COURT.**

The W. L. Wells Company
vs.
The Avon Mills and The Gastonia Cotton Manufacturing Company.
} Opinion.

There are two cases pending for trial, the one The W. L. Wells Company vs. The Avon Mills, and the other the same plaintiff against the Gastonia Cotton Manufacturing Company. The matters involved are substantially the same in both cases, and, by consent of all parties, the two cases are consolidated for trial. The fact is undisputed that the defendants dealt with the plaintiff as a corporation under its corporate name, and bought cotton which was delivered to defendants by plaintiff at an agreed price, and that the amount claimed by plaintiff for the purchase of the cotton is correct. The defendants then set up two defenses against plaintiff's recovery, the first as to the jurisdiction of the court, and the second an alleged payment of $50,000.00 on plaintiff's debt. In the first place, the defendants deny that the plaintiff is a corporation under the laws of the State of Mississippi, and is, therefore, not a citizen of said State, and cannot maintain its action in this court. This defense is based upon the allegation that plaintiff was not duly organized under its charter, and was not in fact a corporation at the time of its dealings with defendants and at the bringing of the suits; and it is contended by defendants that if this be true, the plaintiff did not have a legal existence as a corporation in the State of Mississippi, was not a citizen of said State, and, consequently, there was no diverse citizenship, and this court has no jurisdiction of the cause of action. The evidence upon this point is uncontradicted, and consists of a charter duly issued under the laws of the State of Mississippi creating a corporation to be called The W. L. Wells Company, in which W. L. Wells, John T. Wells and George Butterworth are named as corporators, authorizing the organization of said corporation with a capital stock of $50,000, the purpose of the corporation being to deal in cotton, to begin business as such dealer when the sum of ten thousand dollars of the capital stock was paid in. Under the authority of this act of incorporation the corporators met, organized and elected W. L. Wells president of the company, and one of the other corporators as secretary & treasurer. Thereupon a charter or certificate of incorporation was duly issued to the said company by the proper authorities of Mississippi, and the company commenced business. The ten thousand dollars of capital stock was not paid in at first, but

185 the undisputed testimony is that the net profits of the company for the first year of its business was $37,000, and from this amount the required ten thousand dollars of capital stock was paid in. The dealings of defendants with the plaintiff commenced soon after the corporation was organized, but the account between them for the first year has all been settled up, and the account upon which this controversy arises is based on transactions subsequent to the first year of plaintiff's existence as a corporation, and after the ten thousand dollars of capital stock had been paid in, so that plaintiffs had not only organized as a corporation under the provisions of law, but, according to the evidence, the ten thousand dollars of capital stock had been paid anterior to the time the cause of action in this case arose. All of the transactions which the defendants had with the plaintiff were in its corporate capacity as the W. L. Wells Company. Every letter of plaintiff to defendants, and there are a great many of them, concerning the sale and delivery of the cotton for which the plaintiff sues, is upon paper headed "The W. L. Wells Company, Incorporated," and the defendants, in answer to these letters, and in making orders for cotton to be shipped to the mills, in every instance addressed "The W. L. Wells Company." The bills of lading for cotton shipped defendants were made out in the name of the W. L. Wells Company, and the checks sent by defendants in making payments were all payable to the said company.

The first question, and that is the question which affects the jurisdiction, is this: Is the W. L. Wells Company a corporation of the State of Mississippi, and thus entitled to maintain its action against the defendants, who are citizens of North Carolina, in the Circuit Court of the United States? It is the opinion of the court that the evidence is conclusive upon this point. It is true that at the time the corporators perfected the organization of the corporation the ten thousand dollars of capital stock required to be paid before the corporation could engage in business was not paid, but, although this be true, when the company was organized and its officers elected under the provisions of the act of legislature, the company assumed a legal existence. The persons named in the charter had exercised the franchise of the corporators; that is, the right to organize and exist as a legal entity. There yet remained to the company the right to exercise the franchise of the corporation, which was the right to buy and sell cotton in pursuance of the purposes for which the corporation had been created. In this charter, as in many others, there are two separate and distinct franchises; the one is the franchise of the corporators named in the act, which is the power conferred upon them to organize and become a body politic; the other

186 is the franchise of the corporation; that is, the right of the corporation, when it has been organized, to proceed to business. The body becomes a corporation when the individual corporators have exercised the first right; that is, to organize under the provisions of the charter, and when this is done, in the opinion of the court, the corporation has a legal existence such as to render it capable of suing and being sued. If, however, this doctrine is not sound, it is a fact that before the transactions which are the ground of this claim were begun with the defendants in this case, the corporation known as the W. L. Wells Company had not only organized under the provisions of the law, but had actually paid in the ten thousand dollars of capital stock which authorized it to proceed to do business, for the testimony of John T. Wells is undisputed either by facts or circumstances, that the ten thousand dollars of capital stock was paid in from the first year's profits. Further than this, even if the requirements of the charter have not been complied with to the extent necessary to constitute a corporation under the laws of Mississippi, yet it is an uncontroverted fact that W. L. Wells, John T. Wells and George Butterworth are all citizens and residents of the State of Mississippi, were so at the time of dealings with defendants and at the time of the bringing of this suit, and still are citizens of said State, and defendants are citizens of North Carolina. Can it be, therefore, that, upon a mere technical question of corporation or no corporation, these parties, who have bought and delivered cotton to defendants upon defendants' order, at prices which are not disputed by the defendants, are to have their suit dismissed from court; to be ousted of their remedy to recover from defendants a debt, part of which is at least admitted now to be due. The court cannot coincide with this view, but, on the other hand, is of the opinion that plaintiff is a corporation, and is entitled to maintain its action, and the jury is instructed to find the issue as to jurisdiction in favor of the plaintiff. On this point the court does not deem it necessary to discuss the question that plaintiff was exercising corporate franchises with the knowledge and *consent* of the State of Mississippi. *Tulare Irrigation Dis't.* vs. *Shepard*, 185 U. S.

The defendants next allege a payment of fifty thousand dollars upon plaintiff's claim, the basis of payment being money paid by John F. Love, as secretary and treasurer of the two defendants, to a corporation known as the Loray Mills, for stock to that amount in said corporation. The evidence to support this payment is substantially that W. L. Wells agreed to take fifty thousand dollars of stock in the Loray Company, as shown by a letter written by him to Jno. F. Love on October 4th, 1900. In this letter Wells stated that he had arranged to take fifty thousand dollars of the Loray stock, but

187 asked to let it come in on the last payments. In the same letter Wells wrote Love in substance to keep the Loray subscription a secret from his Wells', associates, and to mark letters to him concerning it "personal." This injunction was observed by Love, according to the testimony. W. L. Wells and Love had had some conversation about the former taking stock in this company before, but nothing definite had been said until this letter was written. Love at one time, so he testified, had taken ten thousand dollars of money due the W. L. Wells Company for cotton and applied it as a payment upon the Loray stock, and at another time took forty thousand dollars of money due the W. L. Wells Company for cotton and applied it in the same way, but there was no evidence whatever that these alleged applications of money were made by authority or consent of the W. L. Wells Company, or that the said company ever ratified said payments. Neither was there any evidence that W. L. Wells was authorized by the company to subscribe for stock in the Loray Company when he agreed to take the stock, or that the Company at any time ratified any subscription for stock in the Loray Company made by the said W. L. Wells. Love did not give notice to the company that he had taken any money due it and applied it for payment for stock in the Loray Mills, and it was not until the W. L. Wells Company had called upon the defendants for a settlement of the amount due for cotton and for which this suit is brought, that Love, as agent for the defendants, or in any other manner, made known to the W. L. Wells Company that the alleged payment of fifty thousand dollars was claimed.

In the last defense set up by the defendants; that is, the alleged payment of fifty thousand dollars claimed as a credit upon plaintiff's debt, three principles of law are involved: First, that defendants, having dealt with plaintiffs as a corporation, are estopped to deny its corporate existence in order to prevent a recovery for the price of cotton sold and delivered. This principle is so well settled that no citation of authority in support seems to be necessary, but attention is called to *Chubb* vs. *Upton*, 95 U. S., 665, & *Balto. & Potomac R. R. Co.* vs. *First Baptist Church*, 137 U. S., 568. Second, W. L. Wells, being the agent of the plaintiff corporation, for the purpose of carrying on its business as a dealer in cotton, was not authorized to subscribe for stock in an incorporated company for his principal, and the principal would not be bound by any contract the said agent would make in this behalf, unless express authority is shown, or there is evidence that such contract was afterwards ratified by the principal; nor was it within the scope of the agent's authority to direct the application of money due his principal in payment for stock in the Loray Company, and if defendants thus applied money due plaintiff, without the consent of the plaintiff, it was authorized,

188 and such application cannot avail defendants against plaintiff's recovery in this action, unless the defendants introduce testimony which satisfies the jury that the plaintiff afterwards ratified the transaction.

As before stated, the negotiations in regard to the subscription for stock in the Loray Company were had between W. L. Wells and Love. There is no evidence that these negotiations were ever brought to the knowledge of the plaintiff, nor to John T. Wells and George Butterworth, the other incorporators, nor is it shown that the plaintiff, in its corporate capacity, or that the associates of W. L. Wells had any knowledge whatever of the application of money due for cotton in payment for stock in the Loray Company; nor is there any evidence that the plaintiff corporation or W. L. Wells' associates, by any subsequent act, ratified the subscription for stock or the application of funds in payment therefor.

Shutz vs. *Jordan*, 141 U. S., 213.
Owings vs. *Hull*, 9 Peters (9 Law Ed.), 627.
Baldwin vs. *Burroughs*, 47 N. Y., 211.
Starr & Co. vs. *Galgate Ship Co.*, 68 Fed. Rep., 243.

From the evidence in this case, the conclusion is irresistible that the defendants were put upon notice that the contract which they allege for the Loray stock was a contract for the benefit of W. L. Wells, individually, and, being thus put upon notice of this fact, they were bound to inquire into the authority of W. L. Wells, no matter how general his powers might have been, as it is a rule of universal application that no agent, however general his authority, can apply his principal's property to the payment of his individual debts without the special authority of his principal; and it is a further rule of law that he who assumes to rely upon the authority of an agent to bind his principal to the discharge of his own obligations must prove actual authority if a contention arises.

Christy vs. *Foster*, 61 Fed. Rep., 551.
Park Hotel Company vs. *Bank*, 86 Fed. Rep., 742 (C. C. A.).

Third. The defendants having admitted the purchase of the cotton, and its delivery at an agreed price, the burden is then upon them to prove, by a preponderance of testimony, a payment which is alleged by them and denied by the plaintiff. Upon consideration of all the testimony in this case, the court is of the opinion that there is no evidence reasonably sufficient to go to the jury to sustain defendant's alleged payment. Wells was not authorized to subscribe for stock for the plaintiff in the Loray Mills, or any other corporation, nor was the money paid by Love for the stock applied with the knowledge or assent of the plaintiff, or such application after-

189 wards ratified by it. W. L. Wells had no power to bind his company upon any such contract, either as to the subscription for the stock or as to the payment of the money from the amount due for cotton. At the time the money of the plaintiff was taken by Love and applied, as he states, in payment for stock in the Loray corporation, the said corporation had not been organized, nor was it organized for months afterwards, and when the organization took place no representative of the plaintiff company was present, and there is no evidence that the plaintiff had notice of the meeting at which the organization was perfected; indeed, the evidence shows that W. L. Wells himself had no notice of the meeting at which the organization was effected, and was not present either in person or by proxy. In the mean time, the capital stock of the Loray Company, which was one million dollars, was changed, and, instead of one million dollars of stock, all of the same character, seven hundred thousand dollars of preferred stock was issued to certain stockholders, and three hundred thousand dollars of common stock remained, and of the three hundred thousand dollars of common stock it was proposed to issue fifty thousand dollars to the W. L. Wells Company as a payment on its debt for cotton. In other words, after seven hundred thousand dollars of stock in the Loray Mills had been preferred and given priority in lien upon the property and for the dividends of the Company, the proposition was to issue fifty thousand dollars of the common stock, which, so far as the evidence shows, was without market value, as a credit upon a valid debt due W. L. Wells Company for cotton which had been sold and delivered to the defendants, and had been consumed by them in their operations. The jury is, therefere, instructed to find the other issues submitted to them in favor of the plaintiff.

Endorsement: Filed in this office Sept. 13, 1902.

H. C. COWLES, Clerk.

190 PETITION FOR WRIT OF ERROR.

UNITED STATES OF AMERICA:

IN THE CIRCUIT COURT FOR THE FOURTH CIRCUIT, WESTERN DISTRICT OF NORTH CAROLINA.

Gastonia Cotton Manufacturing Company, Plaintiff in Error,
vs.
W. L. Wells Company, Defendant in Error.
} At Law.

To the Honorable Judges of the said Court:

And now comes the above-named plaintiff in error, the Gastonia Cotton Manufacturing Company, who, considering itself aggrieved by a judgment entered against it in this action on the day of June, 1902, hereby prays that a writ of error may issue to the Circuit Court of the United States for the Western District of North Carolina, in order that the said judgment and the action of the court in its rulings and in the instructions given by it to the jury, which were in fact given by the said court, and all of which rulings and instructions were separately and duly objected to by the said plaintiff in error, and all other errors committed by the said court to the prejudice of the plaintiff in error, which appear in the Bill of Exceptions and Assignment of Error, may be reviewed and reversed by the United States Circuit Court of Appeals for the Fourth Circuit, and the said plaintiff in error files herewith an assignment of error, setting out separately and particularly each error asserted or intended to be argued and relied on in said Circuit Court of Appeals by the plaintiff in error.

And the said plaintiff in error offers herewith good and sufficient security that it will prosecute the said writ of error to effect, and, if it fails to make its plea good, it will pay the damages and costs as conditioned in its said bond.

Wherefore, the said plaintiff in error prays that a writ of error may be allowed and issued in this behalf for the correction of the error complained of, and that a transcript of the record, proceedings and papers in said cause, upon which the said final judgment was made, together with the bill of exceptions and assignment of error and all other papers and proceedings may be sent up, duly authenticated, to the United States Circuit Court of Appeals for the Fourth Circuit.

GASTONIA COTTON MANUFACTURING COMPANY,
By CHARLES PRICE and BURWELL, WALKER & CANSLER,
Attorneys and Counsel.

191 Writ of error allowed this 28th day of August, 1902.

JAS. E. BOYD,
United States Judge.

Endorsed as follows: Filed in this office the 28th day of August, 1902.

H. C. COWLES, Clerk.

ORDER GRANTING WRIT OF ERROR.

UNITED STATES OF AMERICA:

CIRCUIT COURT OF THE UNITED STATES FOR THE FOURTH CIRCUIT AND WESTERN DISTRICT OF NORTH CAROLINA—AT CHARLOTTE.
JUNE TERM, 1902.

Gastonia Cotton Manufacturing Company, Plaintiff in Error,
vs.
Wells Company, Defendant in Error.
} At Law.

On this, the 28th day of August, 1902, came the plaintiff in error, by its attorneys, and filed herein and presented to the court its petition, praying for the allowance of the writ of error intend*ing* to be urged by it, and praying also that a transcript of the records, proceedings and papers upon which the judgment herein was rendered and the other papers and proceedings in this cause, duly authenticated, may be sent to the United States Circuit Court of Appeals of the Fourth Judicial Circuit, and that such other and further proceedings be had as may be proper in the premises.

In consideration whereof, the court doth allow the writ of error, the plaintiff in error having given a good and sufficient bond according to the statute in such cases made and provided, and the rule of the said court, in the sum of forty-five thousand dollars, which shall operate as a *supersedeas* bond in this case and shall stay the execution of the judgment until otherwise provided.

This, the 28th day of August, 1902.

JAS. E. BOYD,
United States Judge.

192 Endorsed: Filed in my office the 28th day of August, 1902.

H. C. COWLES,
Clerk of the United States Circuit Court.

WRIT OF ERROR.

UNITED STATES OF AMERICA, } ss:

The President of the United States to the Honorable Judges of the Circuit Court of the United States for the Western District of North Carolina—Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Wells Company, plaintiffs, and the Gastonia Cotton Manufacturing Company, defendant, a manifest error has happened, to the great damage of the said Gastonia Manufacturing Company, as by its complaint appears. We, being willing that error, if any hath been, should be fully corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Fourth Circuit, together with this writ, so that you have the same at Richmond, on the 26th day of September next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

{ Seal of the Court. } Witness the Honorable Melville W. Fuller, Chief Justice of our Supreme Court, the 28th day of August, in the year of our Lord one thousand nine hundred and two.

H. C. COWLES,
Clerk of the Circuit Court of the United States,
Western District of North Carolina.

Allowed by—
JAS. E. BOYD, U. S. Judge.

Due service of the within writ of error was made on the 28th day

193 of August, 1902, by the filing of a true copy thereof in the office of the Clerk of the Circuit Court of the United States for the Western District of North Carolina, at Charlotte, N. C., on that day, and service of the same is also accepted by the attorneys of record for defendants in error, Wells Company, in the following words and figures, which are endorsed on the writ:

Endorsed: Service of the within writ of error in the case of Gastonia Cotton Manufacturing Company, plaintiff in error, and Wells Company, defendants in error, is this day accepted by the undersigned, attorneys and counsel of record of the said Wells Company, and further service of said writ of error is hereby waived.

This, the 28th day of August, 1902.

JONES & TILLETT,
Attorneys and Counsel for Defendants in Error.

Endorsed: Filed in this office 28th day of Aug., 1902.

H. C. COWLES,
Clerk United States Circuit Court for the
Western District of North Carolina.

CITATION.

UNITED STATES OF AMERICA, } ss:

The President of the United States, to Wells Company—Greeting:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Fourth Circuit, to be holden at Richmond, Virginia, on the 26th day of September, pursuant to a writ of error filed in the Clerk's Office of the Circuit Court *for* the United States for the Western District of North Carolina, wherein Gastonia Cotton Manufacturing Company *id* plaintiff in error, and you are defendants in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error in the said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

{ Seal of the Court. } Witness, the Honorable James E. Boyd, Judge of the Circuit Court of the United States, this 28th day of August, 1902, in the year of our Lord one thousand nine hundred and two.

JAS. E. BOYD,
U. S. Judge Presiding.

194 Endorsed: Service of the within citation in the case of Gastonia Cotton Manufacturing Company, plaintiff in error, and Wells Company, defendants in error, is this day accepted by the undersigned, attorneys and counsel of record of the said Wells Company, and further service of said citation is hereby waived.

This, the 28th day of August, 1902.

JONES & TILLETT,
Attorneys and Counsel for Defendants in Error.

Endorsed: Filed in this office 28th day of Aug., 1902.

H. C. COWLES,
Clerk United States Circuit Court for the
Western District of North Carolina.

ORDER ENLARGING TIME FOR FILING RECORD.

UNITED STATES OF AMERICA:

IN THE CIRCUIT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF NORTH CAROLINA.

Gastonia Cotton Manufacturing Company,
Plaintiff in Error,
vs.
Wells Company, Defendants in Error.

In the above-entitled case, for good and sufficient cause shown to me, the Circuit Judge who presided at the trial of the said cause, and who signed the citation herein, I do hereby enlarge the time for docketing the case and filing the record thereof with the Clerk of the Circuit Court of Appeals at until the 1st day of October, A. D. 1902.

This order is made under Rule 16 of the said Circuit Court of Appeals for the *Fourt* Circuit.

This 28th day of August, 1902.

JAS. E. BOYD,
United States Judge.

195

CLERK'S CERTIFICATE.

UNITED STATES OF AMERICA:

CIRCUIT COURT OF THE UNITED STATES, WESTERN DISTRICT OF NORTH CAROLINA, FOURTH CIRCUIT, AT CHARLOTTE, N. C.

I, H. C. Cowles, Clerk of the Circuit Court of the United States for the Western District of North Carolina, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of W. L. Wells Company against the Gastonia Cotton Manufacturing Company, as *the* fully the same remain on file and of record in my office.

{Seal of the Court.}

In testimony whereof, I hereunto set my hand and affix the seal of the said court at office in the city of Charlotte, in said district, this 23d day of September, A. D. 1902.

H. C. COWLES,
Clerk of Said Circuit Court.

196 NORTH CAROLINA, Mecklenburg County.

W. L. Wells Company, Petitioner, *vs.* Gastonia Cotton Manufacturing Company. } No. 237. Oct. Term, 1904.

Whereas, the original record has various exhibits to the depositions of witnesses John T. Wells, and John F. Love, which do not appear on the page- of the record but are printed in the original record, as exhibits to their respective depositions, without giving the page of the record where the exhibits would be found, and whereas it has been found by experience of counsel on both sides that this is confusing, and whereas both sides desire to correct this as far as possible;

Now therefore, it is agreed that the Clerk of the Supreme Court may print the record hereto attached which contains references to the pages upon which the said exhibits appear, and the same shall be deemed the record in the Supreme Court of the United States on the argument of this cause.

C. W. TILLETT,
MURRAY F. SMITH,
J. HIRSH,
Attorneys for Petitioner.
CHAS. PRICE,
Attorney for Respondent.

196½ [Endorsed:] File No. 19312 Supreme Court U. S. October term, 1904 Term No. 237 W. L. Wells Company petitioner *vs.* Gastonia Cotton Manufacturing Co. Stipulation to correct record Filed Sept. 10, 1904

197 **PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FOURTH CIRCUIT.**

No. 469.

Gastonia Cotton Manufacturing Company, Plaintiff in Error, *vs.* W. L. Wells Company, Defendant in Error. } In Error to the Circuit Court of the United States for the Western District of North Carolina, at Charlotte.

Sept. 24, 1902, the transcript of record is filed and the cause is docketed.

Same day, appearance of Burwell, Walker & Cansler and Charles Price for the plaintiff in error, order filed.

Octo. 6, 1902, twenty copies of the printed record is filed.

Octo. 9, 1902, appearance of Jones & Tillett and Murray F. Smith for the defendant in error, order filed.

AGREEMENT AS TO FILING BRIEFS.

Filed Octo. 24, 1902.

IN THE UNITED STATES CIRCUIT COURT OF APPEALS, FOR THE FOURTH CIRCUIT. AT RICHMOND, VA.

Gastonia Cotton Manufacturing Company, Plaintiff in Error,
vs.
W. L. Wells Company, Defendant in Error.

In the above entitled case, it is agreed and stipulated by and between the counsel for the plaintiff in error and the counsel for the defendant in error, that the counsel for the plaintiff in error shall have until and including Monday the 3rd day of November, 1902, to file printed brief under the rule of said court, and the counsel for the defendant in error shall have until and including Thursday, the 13th day of November, 1902, to file printed brief in reply, and
198 this stipulation shall be filed in the case.

This the 20th day of October, 1902.

BURWELL, WALKER & CANSLER,
Attorneys for Plaintiff in Error.
JONES & TILLETT,
Attorneys for the defendant in error.

On another day, to-wit, Nov. 17, 1902, (November Term, 1902) the cause came on to be heard before Judges Goff, Brawley and Purnell, and is argued by counsel, and submitted.

ORDER FOR RE-ARGUMENT.

Filed Nov. 6, 1903.

Gastonia Cotton Manufacturing Co.,
vs.
W. L. Wells Company.
No. 469.

Ordered, that this case be replaced on the docket for re-argument of the same to be had. The case will be placed at the foot of the docket and be called during the present term of the court. The clerk will advise counsel accordingly.

N. GOFF,
Senior Circuit Judge.

And on another day, to-wit: Nov. 23, 1903, (same term) the cause came on again to be heard and re-argued by counsel before Judges Goff, Simonton and McDowell, and submitted.

Afterwards, to-wit: February 2, 1904, (February term, 1904,) the court announced and filed its opinion, which is as follows, to-wit:

199 **UNITED STATES CIRCUIT COURT OF APPEALS,**

FOURTH CIRCUIT.

No. 469.

Gastonia Cotton Manufacturing Company, Plaintiff in Error, *versus* W. L. Wells Company, Defendant in Error.	In Error to the Circuit Court of the United States for the Western District of North Carolina, at Charlotte, N. C.

[Argued Nov. 23, 1903. Decided Feb. 2, 1904.]

Before GOFF and SIMONTON, Circuit Judges, and McDOWELL, District Judge.

CHARLES PRICE and ARMISTEAD BURWELL for plaintiff in error, and MURRAY F. SMITH and CHARLES W. TILLETT, for defendant in error.

SIMONTON, Circuit Judge:

This case comes up by writ of error to the Circuit Court of the United States for the Western District of North Carolina. The action was brought in the court below in the name of the W. L. Wells Company against the Gastonia Cotton Manufacturing Company on a money demand for $35,967.60. The complaint, in its first paragraph, setting out the jurisdiction of the court, alleges that the plaintiff is a corporation created and duly organized under the laws of the State of Mississippi, and is a citizen and resident of the
200 State of Mississippi; and the defendant is a corporation under the laws of North Carolina. The defendant, in the first paragraph of its answer, admits its own corporate character under the laws of North Carolina, but adds: "It has no knowledge or information sufficient to found a belief as to the truth of the allegation contained in the first section of the complaint, to-wit: that the plaintiff is a corporation organized under the laws of the State of Mississippi, and a citizen and resident of that State, and, therefore, it denies the said allegation." This is strictly in accordance with code pleading and practice which prevails in North Carolina. Under this system of pleading there are two modes of defence to a

complaint, demurrer and answer. So this defence set up here, which ordinarily would be made by plea in abatement, is properly made in the answer. (Code of Procedure of North Carolina, Section 240.) So when the case was heard before the jury, the court below in formulating the issues put as the first two, these:

"1st. Is plaintiff a corporation as alleged in the complaint.

"2nd. Is plaintiff a citizen of the State of Mississippi."

These issues are practically one and the same. Having formulated the issues, the court directed the jury to find them in the affirmative. The issues presented, as will be seen hereafter, were both issues of law.

The jury having found for the plaintiff on all the issues under instructions, a writ of error was allowed, and the case is here on assignments of error. The first five go to the instructions of the court on the first and second issues.

The burden of proof on these issues being on the plaintiff below, these facts appeared:

W. L. Wells was dealing in cotton in the State of Mississippi, and conducted a large business, among others with the defendants below. In 1898 a charter was applied for by him, John T. Wells and George Butterworth, for an incorporation under the name of the W. L. Wells Company. Charters in Mississippi are granted under general laws.

An application is made to the Governor for a charter. He
201 refers the proposed charter to the Attorney General, and upon his certificate that it is not violative of the Constitution and laws of Mississippi, the Governor approves it and causes the Great Seal to be affixed to it. In the present case the following form of charter was submitted to the Governor of Mississippi, and by him referred to the Attorney General 26th April, 1898.

"Section 1. Be it known and remembered that W. L. Wells, John T. Wells and George Butterworth, their associates and assigns, are hereby created a body politic and corporate, under the name and style of W. L. Wells Company, and by that name shall have succession for fifty years, shall have power to sue and be sued, contract, and be contracted with, may have a corporate seal, and break and alter the same at pleasure.

"Section 2. The capital stock of said corporation shall be fifty thousand dollars, divided into shares of five hundred dollars each, and as soon as ten thousand dollars of said stock is subscribed and paid for, said corporation shall have power to commence business.

"Section 3. Said corporation is formed for the purpose of conducting a general cotton business, and may buy and sell cotton, and may transact a cotton factorage business, may advance money or supplies for the purpose of controlling shipments of cotton, may take and receive mortgages or deeds of trust upon property to secure said advances, and, generally, may have all powers conferred by Chapter 25 of the Annotated Code of 1892, necessary and requisite to carry out the purpose of said corporation.

"Section 4. The board of directors of said corporation shall con-

sist of three persons, whose numbers may be increased at any time by a majority vote of the stockholders, and said directors shall have power to elect all necessary officers, and prescribe the duties, salaries and tenure of such officers.

"The foregoing proposed charter of incorporation is respectfully referred to the Honorable Attorney General for his advice as to the constitutionality and legality of the provisions thereof.

"A. J. McLAURIN, Governor.

"Jackson, Miss., April 26th, 1898.

202 "The provisions of the foregoing proposed charter of incorporation are not violative of the Constitution or laws of the State.

"WILEY N. NASH,
"Attorney General.

"Jackson, Miss., April , 1898.

"Executive office, (State Coat of Arms), Jackson, Mississippi.

"The within and foregoing charter of incorporation of the W. L. Wells Company is hereby approved.

{ Great Seal of the State of Mississippi. } "In testimony whereof, I have hereunto set my hand and caused the Great Seal of the State of Mississippi to be affixed this 1st day of June, 1898.

"By the Governor: A. J. McLAURIN.

"J. L. POWER,
"Secretary of State.

"Office of Secretary of State, Jackson, Mississippi.

"I, J. L. Power, Secretary of State. do certify that the charter hereto attached, incorporating the W. L. Wells Company, was, pursuant to the provisions of chapter 25 of the Annotated Code, 1892, recorded in the book of Incorporations in this office.

{ Great Seal of the State of Mississippi. } "Given under my hand the Great Seal of Mississippi hereunto affixed this 1st day of June, 1898.

"J. L. POWER,
"Secretary of State."

The Attorney General gave his certificate in favor of the constitutionality of the proposed charter on day of April, 1898. And on 1st day of June, 1898, the Governor caused the Great Seal of the

State to be put to the charter. The act under which the Governor approved this charter declares: "The powers therein specified shall by the approval of the charter be vested in such corporation
203 and it shall go into operation at the time and on the terms and conditions specified."

It will be noted that the second section of this charter fixed the terms and mode in which it would get life, could act as a corporation. "The capital stock of said corporation shall be $50,000, divided into shares of $500, each, and as soon as $10,000 of said stock is subscribed and paid for, said corporation shall have power to do business."

The Governor having sealed the charter, the incorporators met on 18 July, 1898, read over and adopted it. Books of subscription were then opened and W. L. Wells subscribed for ten shares, John T. Wells for five shares and George Butterworth for five shares. On the same day and at the same place a stockholders' meeting was held, and W. L. Wells, John T. Wells and George Butterworth were elected directors. The meeting thereupon adjourned and the record does not disclose whether they met again or not. John T. Wells, who was secretary and treasurer of the company, says that when the stock was subscribed for nothing was paid; that he paid for the stock out of the profits of the first year, so did Butterworth and so did W. L. Wells. Yet he says that these profits were never divided, no dividend was ever declared, no money carried to credit of any stockholder, no stock certificates ever issued. He goes on to say that he never paid any cash into the Wells Company, nor did Butterworth, nor did W. L. Wells, and that there was absolutely no capital to start with. That, notwithstanding, he drew out $10,217.55, and Butterworth took $9,022.65. Both he and Butterworth being men of small means, having no property liable for their debts. It is very clear from this that having a charter like this conditioned upon the payment of $10,000 in subscriptions, then these men undertook to exercise powers in the charter, without fulfilling or attempting to fulfill the conditions precedent in the charter. That even when they had made money in the business they ignored the corporation altogether, and drew the money out of the business as if it belonged to them and not to the corporation. The charter never went into operation, and the corporation never became a legal entity. More than this, these assumed co-porators went on in business, contracted obligations in the name of the so-called corporation which did not possess a dollar of property, or have any mode of meeting a
204 debt, thus seeking to cloak their transactions under an assumed corporate name, and avoid in this way all personal responsibility. At the same time two of them were, in a business sense, irresponsible. It would seem that this transaction was an abuse of, and in fraud of, the law. And that Wells Company had never and could not have any legal existence. When a corporation is formed under an enabling act, all the mandatory provisions of the statute must be complied with. In Beach on Private Corporations,

Section 12 (p. 18) we find: "There is a broad and obvious distinction between such acts as are declared to be necessary steps in the process of incorporation, and such as are required of the individuals seeking to become incorporated, but which are not made requisite to the assumption of corporate powers. In respect to the former, any material omissions will be fatal to the existence of the corporation, and may be taken advantage of collaterally in any form in which the fact of incorporation can properly be called in question." The same learned author, at p. 27, says: "It is immaterial that the persons attempting incorporation have acted in good faith, and have actually carried on business under their supposed authority to act as a body corporate." This seems to be in accordance with the law in Mississippi. In *Perkins* vs. *Sanders*, 56 Miss., 733, the Supreme Court of that State says: "In charters which are mere propositions for the organization of a corporation, and which require certain acts to be performed precedent to the existence of the corporation, no corporation can exist, and, of course, no corporate act can be performed till these conditions have been complied with. In all such cases when a certain amount is named in the charter as necessary to be subscribed as the capital stock" (in the case at bar it must be subscribed and paid in) "such subscription" (and of course such payment) "is regarded as *as* condition precedent to the existence of the corporation, unless otherwise provided in the charter." Discussing the broad distinction between a charter which creates a corporation, and invests it at once with corporate powers, and that class of corporations created under general laws requiring an application for a charter, the same court says: "The distinction between the two classes of charters is thus seen to be that in the first class the charter is a mere provision on the part of the legislature for the formation of a
205 corporation upon the doing of certain acts prescribed in the charter as precedent conditions, and as a necessary result no corporate act can be done until these conditions have been performed, except such as may be expressly permitted by the charter, and to those acts it would be considered that the corporation had existence before its full investure with its corporate franchise."

It is contended, however, that the plaintiff, if it be not a corporation *de jure* is a corporation *de facto*, and will be so recognized. That, at least, the defendants having dealt with it as a corporation, are now estopped from denying its existence as a corporation. It must be borne in mind that the question we are now considering is not the relative rights of the plaintiff in error and of the defendant in error. The former may be estopped by its acts. We are dealing with a question of the jurisdiction of this court, a question which the court must always take up, *suo motu*, if necessary, the question being at the threshhold of every case before it. (*Metcalf* vs. *Watertown*, 128 U. S., 586.)

The presumption is always against the jurisdiction of the Circuit Court unless the contrary affirmatively appears. (*Grace* vs. *Am. Cent. Ins. Co.*, 109 U. S. 278.) Its jurisdiction does not depend upon

the consent of parties actually made or constructively implied by estoppel. The jurisdiction is statutory and must follow the statute. When a corporation sues in that court, claiming jurisdiction through diversity of citizenship, it can maintain jurisdiction only by showing that it is the creation of the State of which it claims to be a corporation, and that it is really a corporation. Otherwise it is not a legal entity, a person in the eye of the law. "A corporation cannot for the purpose of jurisdiction in Federal courts be considered a citizen, or a resident, of a State in which it has not been incorporated." (*Southern Pacific Co.* vs. *Denton*, 146 U. S. 203.) When a complainant comes into the Circuit Court of the United States as a complainant and seeks to sustain the jurisdiction by virtue of its citizenship, it must establish that right in itself, and show the credentials of its birth and existence. The fact that as to certain persons and in certain transactions it may be a corporation *de facto* is not enough.

The defendant in error relies with full confidence upon the
206 case of *Tulare Irrigation District* vs. *Shepard*, 185 U. S., 1.

That was an action brought in the Circuit Court of the United States for the District of California by plaintiff against the Tulare Irrigation District, a public municipal corporation of the State of California. This district had issued coupon bonds for the purposes of their work, had floated them in the market, and plaintiff had become a *bona fide* purchaser for value. The coupons being matured, payment was refused and this suit was brought. The defence set up was on certain irregularities in forming the corporation. The act under which the corporation was created required that a petition for the organization of an irrigation district be presented to the supervisors of the county signed by the required number of freeholders. Before the petition was presented the act required that it be published in some newspaper at least two weeks before its presentation, "together with a notice stating the time of the meeting at which the same will be presented." In that case the petition was properly prepared and signed. The petition with the signatures was published in the proper newspaper together with the notice, but the signatures attached to the petition were not reproduced after the notice. All of the public signatures and notice were published in the same column and as one entire proceeding, separated from the rest of the contents of the newspaper by a black line across the column above and another across the column below this publication. This was charged as a fatal defect, and the bonds were claimed to be invalid. The opinion of the Supreme Court strikes the keynote of the decision in the opening sentences: "It is agreed in the statement of facts of this case that the money received from the sale of the bonds in suit were applied to building and constructing the irrigation works now in use by the defendant corporation. It has, therefore, received full consideration for which the bonds were issued, has built its works with the proceeds, and uses such works for the purposes intended. Notwithstanding these facts, it now refuses to

pay the bonds or the interest thereon, and while acting as a corporation at all times, still sets up that it never was legally organized, and hence had no legal right to issue any bonds." In the case of *Douglas County Commissioners* vs. *Bolles*, 94 U. S. 104, the court said: 'Common honesty demands that a debt thus incurred should be paid.' That sentiment has lost no force by
207 lapse of time, and we think applies in its full strength to this case. Unless there be some settled rule of law which prevents a recovery in this action, the judgment under review should be affirmed." This idea dominated the decision. It is evident from the opinion that the court thought the defendant a corporation *de jure*. But in the argument, assuming that there were irregularities, the court held that inasmuch as it attempted to organize under a general law, and that it actually used the franchise, and continued to act in every respect as a corporation, it could not deny its corporate existence so as to defeat its obligations. Indeed, had any other conclusion been reached, a fraud would have been sustained. The distinction between that case and the one at bar is broad and distinct. In the latter case the plaintiff below went into the circuit court claiming the jurisdiction because, and only because, it was a corporation, resident in a State other than the defendant. It was bound to prove its claim. In doing so it did not prove a *bona fide* attempt to fulfill the conditions of its incorporation. On the contrary, there is no evidence whatever of its use of the corporate franchise. It had no certificates of stock, no corporate capital, no declaration of dividends, and, as far as the record discloses, no corporate meeting after the first. Nor, as will be seen hereafter, will the ends of justice be defeated if it be not treated as a corporation.

In *Baltimore & Potomac R. R. Co.* vs. *Fifth Baptist Church*, 137 U. S., 568, the point now under discussion could not arise as the jurisdiction was not involved. *Shapleigh* vs. *San Angelo*, 167 U. S., 646, simply decides that a State, being creator of a municipal corporation, is the proper party to impeach the validity of its creation, and if the State acquiesces in the validity of a municipal corporation, the corporate existence thereof cannot be collaterally attacked.

It will be noticed that in all the cases in which suits by or against *de facto* corporations were sustained, the ruling is that the corporate existence cannot be collaterally attacked. In the case before us there is no collateral attack. The plaintiff below itself put that question directly in issue.

In our opinion, the plaintiff below, defendant in error here, failed to establish its first allegation as to its corporate capacity, and
208 that the court below erred in instructing the jury to find the issues in this regard in its favor.

This conclusion renders unnecessary any discussion of the other assignments of error.

The conclusion reached will not defeat the ends of justice, if the claim of the defendant in error be good. It is competent for the persons claiming to be incorporators to carry on the suit in their own

names, and as they have requisite citizenship the suit can be maintained in the Federal court. *Jones* vs. *Aspen Hardware Co.*, 29 L. R. A., 143.

It is ordered that the judgment of the circuit court be reversed. That this cause be remanded to that court, and if the plaintiffs below, defendants in error here, be so advised as to continue the suit in that court, that they be allowed to amend their complaint by inserting their individual names as plaintiffs, and that, thereupon, a new trial be granted. If, however, they decline to do this, that the suit be dismissed without prejudice.

Reversed.

209 Feb. 6, 1904, (same term) the court made and entered the following judgment, to-wit:

JUDGMENT.

Filed Feb. 6, 1904.

UNITED STATES CIRCUIT COURT OF APPEALS,
FOURTH CIRCUIT.

No. 469.

Gastonia Cotton Manufacturing Company, Plaintiff in Error,	In Error to the Circuit Court of the United States for the Western District of North Carolina.
vs.	
W. L. Wells Company, Defendant in Error.	

This cause came on to be heard on the transcript of the record from the Circuit Court of the United States for the Western District of North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this court, that the judgment of the said Circuit Court, in this cause be, and the same is hereby, reversed with costs, and this cause is remanded to the Circuit Court of the United States for the Western District of North Carolina, at Charlotte, with directions that if the plaintiffs below, defendants in error here, be so advised as to continue the suit in that court, that they be allowed to amend their complaint by inserting their individual names as plaintiffs, and that thereupon a new trial be granted. If, however, they decline to do this, that the suit be dismissed without prejudice.

CHARLES H. SIMONTON,
Circuit Judge.

Feb. 6, 1904.

And on another day, to-wit: February 27, 1904, the mandate of this court is issued and transmitted to the said Circuit Court at Charlotte, N. C., in due form.

210 **CLERK'S CERTIFICATE.**

UNITED STATES OF AMERICA, Fourth Circuit, } ss.:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do certify that the foregoing is a true copy of the entire record and proceedings in the therein entitled cause as the same remains upon the record and files of the said Circuit Court of Appeals.

{Seal of the Court.} In testimony whereof I hereto set my hand and affix the seal of the said United States Circuit Court of Appeals for the Fourth Circuit, this 20th day of April, A. D., 1904.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of
Appeals, Fourth Circuit.

211 UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

UNITED STATES OF AMERICA:

I, Henry T. Meloney, Clerk of the United States Circuit Court of Appeals for the Fourth Circuit, do make return of the annexed writ of certiorari issued out of the Supreme Court of the United States in the cause therein entitled on the 2nd day of June 1904, by annexing hereto a certified copy of the stipulation of the attorneys of record, that the certified copy of the record now on file in the Supreme Court of the United States may be taken as a return to the writ of certiorari.

Seal United States Circuit Court of Appeals, Fourth Circuit. In testimony whereof I hereto set my hand and affix the seal of the said Circuit Court of Appeals on this 13th day of June A. D. 1904.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, 4th Circuit.

C. M. D.

212 UNITED STATES OF AMERICA:

IN THE CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

Gastonia Cotton Manufacturing Company,
Plaintiff in Error,
v.
W. L. Wells Company,
Defendant in Error.

It appearing that the Supreme Court of the United States has issued a writ of certiorari upon application of the W. L. Wells Company in the above entitled cause and has directed that the record and proceedings in said cause be certified and removed into the Supreme Court;

It is now agreed by the attorneys of the above entitled parties that the certified copy of the record now on file in the Supreme Court of the United States may be taken as a return to the writ of certiorari.

This the 8th day of June, 1904.

EDNIS CANSLER,
ARMISTEAD BURWELL,
CHARLES PRICE,
Attorneys for Gastonia Manufacturing Company, Respondents.
CHAS. W. TILLETT,
JONES & TILLETT,
Attorneys for W. L. Wells Company, Petitioners.

[Seal United States Circuit Court of Appeals, Fourth Circuit.]

UNITED STATES OF AMERICA:

I, Henry T. Meloney, Clerk of the United Statess Circuit Court of Appeals for the Fourth Circuit, do certify that the aforegoing stipulation of counsel is a true copy of the original filed June 13, 1904, and now remaining among the records and proceedings in the therein entitled cause.

In testimony whereof I hereto set my hand and affix the seal of the said Circuit Court of Appeals, at Richmond, on this 13th day of June, A. D., 1904.

HENRY T. MELONEY,
Clerk U. S. Circuit Court of Appeals, 4th Circuit.

C. M. D.

213 UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Fourth Circuit, Greeting:

Being informed that there is now pending before you a suit in which Gastonia Cotton Manufacturing Company is plaintiff in error and W. L. Wells Company, is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the Circuit Court of the United States for the Western District of North Carolina, and we, being willing for certain reasons that the said cause and the record and proceedings therein should be certified by the said Circuit Court of Appeals and removed
214 into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the second day of June, in the year of our Lord one thousand nine hundred and four.

JAMES H. McKENNEY,
Clerk of the Supreme Court of the United States.

215 [Endorsed:] File No. 19,312 Supreme Court of the United States. No. 237, October term, 1904. W. L. Wells Company, *vs.* Gastonia Cotton Manuf'g Co. Writ of certiorari and return. The execution of the within writ appears from the schedules thereto annexed. Henry T. Meloney, Clk. U. S. Cir. Ct. Appeals June 13, 1904 Filed June 14, 1904.

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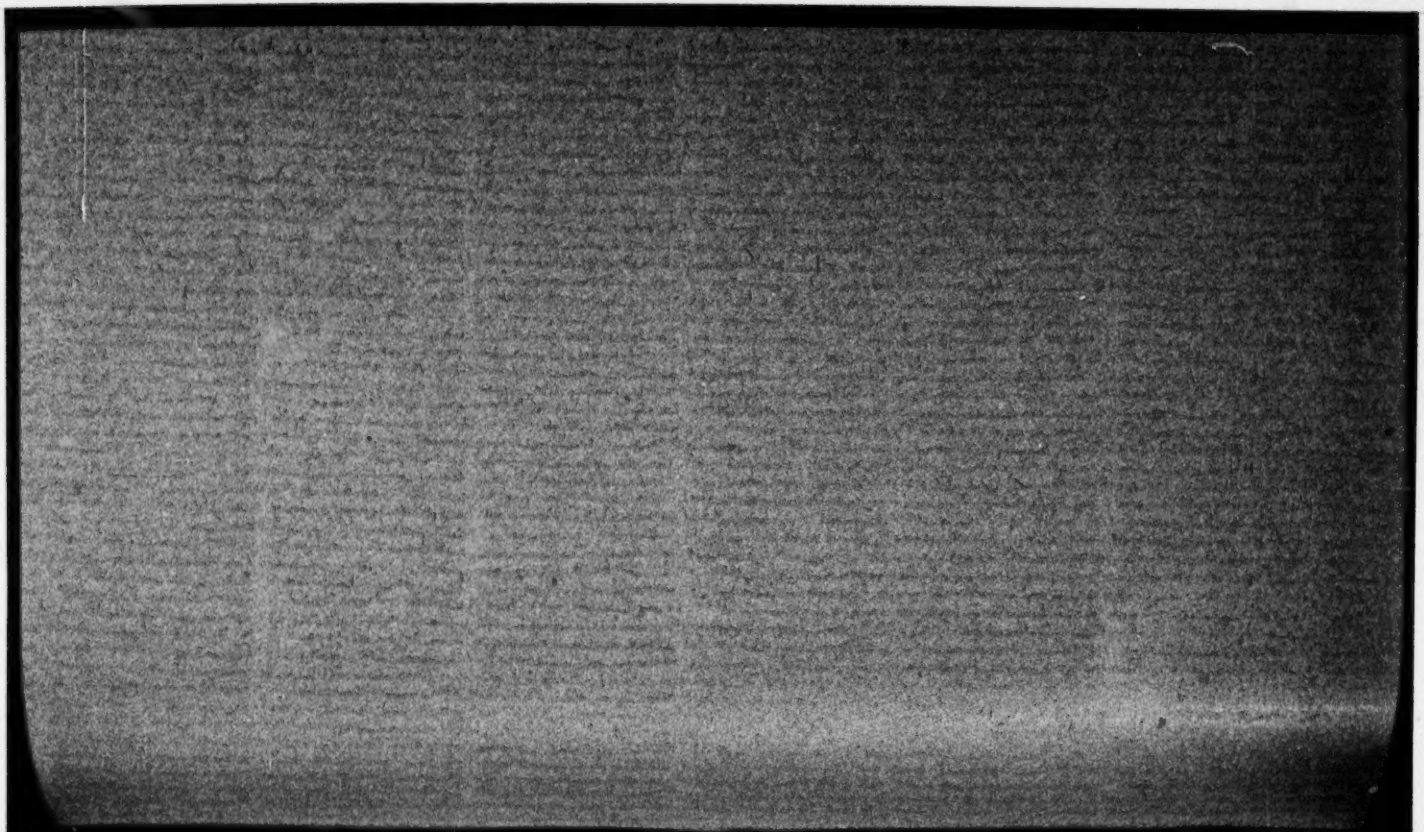
In the Supreme Court of the United States

W. L. Wells Company, Petitioner,

vs.

Gastonia Cotton Manufacturing Company,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.



IN THE SUPERIOR COURT OF THE UNITED STATES.

W. L. Wells Company, Petitioner,

vs.

Gastonia Cotton Manufacturing Company, Respondent.

Petition for Writ of Certiorari, Requiring the Circuit Court of Appeals for the Fourth Circuit to Certify to the Supreme Court for its Review, the Case of "Gastonia Cotton Manufacturing Company, Plaintiff in Error, vs. W. L. Wells Company, Defendant in Error."

To the Honorable, the Supreme Court of the United States:

The petition of the W. L. Wells Company respectfully shows to this Honorable Court as follows:

1. That your petitioner is a corporation chartered, organized and doing business under the laws of the State of Mississippi, and on the 7th day of October, 1901, your petitioner commenced in the Circuit Court of the United States, for the Western District of North Carolina, a civil action against the respondent, the Gastonia Cotton Manufacturing Company, a corporation chartered, organized and doing business under the laws of the State of North Carolina, to recover the sum of Thirty-Five Thousand Three Hundred Ninety-Seven and 99-100 Dollars, with interest thereon, which your petitioner alleged was due to it as balance on account for cotton sold to respondent. At the same time and in the same court your petitioner commenced another action against the Avon Mills for the recovery of twenty-six thousand seven hundred and

fifty 36-100 Dollars and interest which your petitioner alleged to be due as balance on account of cotton sold by it to the said Avon Mills. The pleadings in these two actions were duly filed and at the June Term, 1902, of the said Circuit Court, at Charlotte, N. C., the two causes were by consent of counsel tried together, the same points being involved in both causes. (See record page 14.)

2. Your petitioner further shows that from the answers of the Gastonia Cotton Manufacturing Company and the Avon Mills and from the statement of counsel as set forth in the printed record (p. 15) the said respondents, who were defendants in the actions above mentioned, admitted the sale of the cotton to them and at the prices claimed, but defendants in the first place denied that the plaintiff was a corporation and in the second place the defendants claimed a payment amounting to Fifty Thousand Dollars ($50,000), which sum it was alleged had been paid by the defendants under an agreement between W. L. Wells, the President of your petitioner, whereby the said W. L. Wells agreed that "a portion of the purchase money due for the said cotton might be invested in the stock of a proposed manufacturing plant which was known as the Loray Mills." (See paragraph four of answer on page eight of record). This alleged agreement was controverted by your petitioner, and it was further contended by it that if such an agreement was made by W. L. Wells, your petitioner had no knowledge of it and had not authorized it nor in any way ratified it.

3. At the trial of the actions at the said June Term, 1902, of the Circuit Court at Charlotte, your petitioner introduced in evidence a charter or articles of incorporation duly granted to it by the State of Mississippi, under the provisions of the statute of that State (Record pp. forty, forty-one, forty-two, forty-three, forty-four), and your petitioner further showed in evidence a meeting of the corporation held on July 18th, 1898, in which the incorporators met, accepted the charter and subscribed for capital stock amounting to Ten Thousand Dollars ($10,000) (Record p. 45); and also introduced in evidence minutes of the meeting

of stockholders showing the election of the three incorporators as a Board of Directors of said corporation, and your petitioner further introduced evidence proving the account sued upon.

The respondents introduced in evidence a witness whose testimony it was claimed by respondents tended to show an agreement on the part of W. L. Wells that part of the purchase money of the cotton should be applied in payment of W. L. Wells' subscription to stock in the Loray Mills, a new company which was then being organized and which had no connection with respondents except that it had some of the same officers; and respondents further introduced evidence which they claimed tended to show that part of the purchase money of the cotton had been applied by the respondent in payment of W. L. Wells' subscription for stock in the said Loray Mills. All this testimony was duly objected to by your petitioner (Record pp. 111 and 112), and His Honor, Judge Boyd, ruled that the evidence was insufficient to sustain the contentions of respondents.

4. His Honor, Judge Boyd, further ruled on the evidence introduced that the plaintiff was a corporation duly created and organized under the laws of the State of Mississippi, and a citizen of Mississippi, with power to sue in the United States Courts, and also ruled that in as much as the respondents admitted the accounts to be due as set forth in the complaints and respondents had failed to introduce any evidence which in the opinion of the Court would warrant the jury in finding that your petitoiner had authorized the payment of any part of the purchase money of the cotton upon W. L. Wells' subscription to the stock of the Loray Mills, or had ratified any such appropriation of its funds, that your petitioner was entitled to judgment in accordance with the demands set forth in the complaints and His Honor directed a verdict in both of the cases in favor of your petitioner for the amount claimed, and interest in both cases in the sum of about seventy-five thousand dollars.

See opinion of His Honor, Judge Boyd, filed in the cause, printed in the record, page 184.

5. That as above stated it was agreed between counsel that only one of the actions should be taken upon writ of error to the Circuit Court of Appeals and that the other action should abide the decision of the Court of Appeals (p. 14), and thereupon the respondent, the Gastonia Cotton Manufacturing Company, sued out a writ of error and carried the case before the Circuit Court of Appeals for the Fourth Circuit, assigning as error, first, the ruling of the Court which declared your petitioner a corporation and a citizen of the State of Mississippi, entitled to bring this action and further assigning as error that His Honor Judge Boyd, held that the respondent had failed to adduce any evidence which would warrant the jury in sustaining respondent's plea of the payment of Fifty Thousand Dollars ($50,000).

The said action was heard at the November Term, 1902, of the Circuit Court of Appeals, at Richmond, Virginia, and thereafter by direction of the said Circuit Court of Appeals was reargued at the November Term, 1903, and at February Term, 1904, an opinion was filed in which the ruling of His Honor, Judge Boyd, was reversed in so far as he held that the plaintiff was a corporation, a citizen of Mississippi, and entitled to maintain an action in the United States Court.

A certified copy of the entire record in said cause in said Circuit Court of Appeals is herewith furnished and hereto annexed as a part of this application in conformity with rule thirty-seven (37) of this Hororable Court and the same is marked "Exhibit A."

6. Your petitioner respectfully submits to this Honorable Court that it is advised and believes, and respectfully represents, that the said judgment of the Circuit Court of Appeals is erroneous, and that this Honorable Court should require the said cause to be certified to it for its review and determination, under and in conformity

with the provisions of the 6th section of the Act of Congress, entitled, "An Act to establish Circuit Courts of Appeal, and to define and regulate in certain cases the jurisdiction of the Courts of the United States, and for other purposes," approved March 3rd, 1891: that the jurisdiction of the United States Circuit Court in said cause was dependent entirely upon the opposite parties to the suit or controversy being citizens of different States and therefore the judgment and decree of the said Circuit Court of Appeals is final, subject only to the power and authority of this Honorable Court to review the same by writ of certiorari, as provided in the 6th section of the Act aforesaid.

7. The contentions of your said petitioner made in said cause in the Circuit Court of Appeals and insisted upon here are among others the following:

(*a*) That your petitioner is now and has been ever since the date of the acceptance of the charter on the 18th of July, 1898, (Record p. 45,) and regularly constituted a *de jure* corporation, under the laws of the State of Mississippi. A copy of the material parts of the Statute of Mississippi regulating the incorporation of corporations is hereto attached, marked "Exhibit B," and by reference to this statute and to the Articles of Incorporation of your petitioner (Record p. 42,) and by reference to the minutes of the meeting of the incorporators (Record p. 45,) it will clearly appear to this Honorable Court that your petitioner was chartered and organized in strict conformity with the provisions of the laws of the State of Mississippi.

The first section of your petitioner's charter plainly provided that the incorporators "are hereby created a body politic and corporate, under the name and style of W. L. Wells Company, and by that name shall have succession for fifty years, shall have power to sue and be sued, etc." The second section of the charter provides that "as soon as Ten Thousand Dollars ($10,000) of said stock is subscribed and paid for, said corporation shall have power to commence business" and the third section states

that "said corporation is formed for the purpose of conducting a general cotton business, etc."

Your petitioner submits that there is manifest error in opinion of the Honorable Circuit Court of Appeals in that it entirely ignores the first section of the charter which by words *in praesenti* created your petitioner a corporation with power to sue; and the Circuit Court of Appeals, without discussing the first section of the charter, erroneously construed the second section to mean that the corporation could have no corporate existence until ten thousand dollars ($10,000) in capital stock was paid in; and it is respectfully submitted that the Circuit Court of appeals in this way confused the corporate existence (which was granted by the first section of the charter) with the franchise to do a cotton business, which franchise was not necessary to its corporate existence and upon which the corporate existence was not in any manner made to depend.

Your petioner further calls attention of this Honorable Court to the fact that in the opinion of the Circuit Court of Appeals the Court omits to take any notice of the fact that, although the capital stock was not paid in at the time of its organization, yet one of the incorporators loaned the Company Ten Thousand Dollars (Record p. 34); and the Court failed to give proper weight to another and more material fact, viz., that prior to the time of the dealings which are in controversy in this action the Company had realized profits amounting to Thirty-seven Thousand Dollars ($37,000), and had in its treasury capital profits largely in excess of Ten Thousand Dollars ($10,000) which the second section of the charter required to be paid in. (Record p. 34.)

(*b*) In the second place your petitioner submits that even though there might have been a failure on the part of the incorporators to do something required by the charter, yet there can be no controversy but that the incorporators attempted in good faith to organize a corporation under authority of, and according to, the laws of the state of Mississippi, and your petitioner actually assumed to act as a cor-

poration of Mississippi and dealt with all persons including the respondent for a long period as a corporation, and in all of its correspondence with the respondent used letter heads plainly stating that it was organized and doing busines as a corporation (Record p. 48, and see statement in record that all of correspondence was on similar letter heads Record p. 18.)

Your petitioner therefore submits that in any aspect of the case it was a corporation *de facto* and had a real corporate existence until it was attacked by the proper state authorities,—that its existence as a corporation cannot be called in question in a civil action of this nature. The Honorable Circuit Court of Appeals in its opinion conceded that your petitioner was a *de facto* corporation, but as your petitioner respectfully submits, it erroneously held that a corporation *de facto* is not a citizen of the state under the laws of which it assumed to act, and that it could not maintain an action in the Federal Court.

(*c*) Your petitioner further submits to this Honorable Court that the ruling of His Honor, Judge Boyd, who tried the Case in the Circuit Court, to the effect that the plea of payment which was the only defense upon the merit of the case could not be sustained, is supported by the evidence and by the law bearing upon the questions involved, as will appear by reference to the written opinion of His Honor, Judge Boyd, found in the record, and particularly to pages 186-89; and your petitioner therefore submits that on the point involved in the case, which was not passed upon by the Circuit Court of Appeals, the contention of the defendent is without support either in fact or law.

8. Your petitioner avers that questions of gravity and importance are involved in this case sufficient to justify the exercise of the jurisdiction vested in this Honorable Court to issue *writs of certiorari* requiring the causes to be brought here for review from the Circuit Court of Appeals.

The case at bar and the other case whose determination awaits the decision of this Honorable Court involves the

sum of about Seventy Thousand Dollars ($70,000), and involves the serious question as to the existence of your petitioner as a corporotion under the admitted facts in the case.

Your petioner submits that this is especially a case calling for review by this Honorable Court in that the Circuit Court of Appeals held in the opinion filed that the corporate existence of a corporation could be attacked in a civil action of this nature and further held that an organization, which was admittedly a corporation *de facto*, could not maintain a suit in the courts of the United States as a citizen of the State under authority of which, and by consent of which, it was doing business as a corporation. The Circuit Court of Appeals dismissed the case for want of jurisdiction and thus a serious and important question of the jurisdiction of the Federal Courts is involved in this case; if His Honor, Judge Boyd, in the Circuit Court had ruled that he was without jurisdiction for the reason given in the opinion of the Circuit Court of Appeals, then your petitioner is advised and believes that it would have had the right to have brought this action directly to this Honorable Court upon a writ of error for that the case involved a question of the jurisdiction of the Federal Court. Your petitioner therefore submits that inasmuch as the ruling of His Honor, Judge Boyd, was favorable to your petitioner, that your petitioner ought not to be deprived of the right of having this Honorable Court pass upon the question of jurisdiction by reason of the fact that the respondent, instead of bringing the jurisdictional question to this Honorable Court, carried it to the Circuit Court of Appeals.

Your petitioner further submits herewith a brief showing that the opinion of the Circuit Court of Appeals upon the question involved is in direct conflict with the rulings of this Honorable court and in conflict with the rulings of all the Circuit Courts of the United States that have passed on the question, and your petitioner avers that it is a matter of great importance that this Honorable

Court should settle and determine whether the ruling of the Circuit Court of Appeals in the case at bar is correct or the rulings of other Federal Courts upon the same question.

9. Your petitioner presents herewith certified copy of the record returned from the Circuit Court of the United States Circuit Court of Appeals for the Fourth Circuit and a copy of the record of the last named court.

Wherefore the petitioner prays that this Honorable Court will cause the writ of certiorari to be issued pursuant to the power vested in this Court by the Judiciary Act, approved March 3, 1891, requiring said United States Circuit Court of Appeals for the Fourth Circuit to certify the whole record and cause to this Court for consideration, and that thereon this Court will decide the matter of controversy between the parties.

And your petitioner will ever pray, etc.

W. L. WELLS COMPANY,
Petitioner.

STATE OF MISSISSIPPI,
County of Warren. } ss.

W. L. Wells, being duly sworn, says that he is an officer of the petitioner, the W. L. Wells Company; that he has read the foregoing petition and the facts therein stated are true to the best of his knowledge, information and belief; that this application is made in good faith, and not for the purpose of delay.

W. L. WELLS,
President of W. L. Wells Company.

Sworn to and subscribed before me, this eighteenth day of April, 1904, as witness my hand and notarial seal.

HORACE GARTH JONES.
[NOTARIAL SEAL.] Notary Public.

We the undersigned Attorneys, practicing in the Supreme Court of the United States, hereby certify that we have examined the foregoing petition, and, that in the opinion of each of us, it is well founded and is entitled to the favorable consideration of the Court.

MURRAY F. SMITH,
CHAS. W. TILLETT,
Attorneys.

EXHIBIT B.

"The persons desiring to be incorporated may prepare a charter, drawn up on parchment or paper, which shall be headed 'The Charter of Incorporation of _____ _____ _____,' and it shall contain a clear and definite statement of the purposes for which the corporation is created, the names of the persons desiring to form the corporation, the corporate name by which it is to be known, the powers to be exercised, the period for which said corporation is to exist—never more than fifty years—together with whatever else may be proper to be stated. Charters for telegraph and telephone companies shall also describe the line they propose building and constructing, and the localities it is intended to traverse. And the proposed charter shall be published three consecutive weeks in one or more newspapers published at the domicile of the proposed corporation, and if there be not a newspaper published in the county where such proposed corporation is to be domiciled, then by publication in one or more newspapers published in this state and having circulation in the county of the domicile of the proposed corporation; but corporation for Masonic or Odd Fellows' Lodges, temperance societies, charitable associations, schools and literary institutions, religious societies, fire companies, mechanics' associations, fair associations and agricultural societies shall not be required to make such publication. And the charter so proposed and published, if required to be, shall be submitted for approval to the Governor, who shall take the advice of the Attorney-General as to the constitutionality and legality of the provisions of such charter; if the Governor approve it, he shall write his approval at the bottom of it, and sign his name thereto and shall also cause the great seal of the State to be thereto affixed by the Secretary of State; but the Governor may require amendments or alterations to be made previous to signing the same, or, if deemed expedient by him, he may withhold his approval entirely; and the powers therein specified shall by the approval of the char-

ter, be vested in such corporation, and it shall go into operation at the time and on the terms and conditions specified."

The remaining twenty-eight sections of this chapter relate to renewals and amendments, the powers of corporation already in existence, etc., and we do not therefore quote them.

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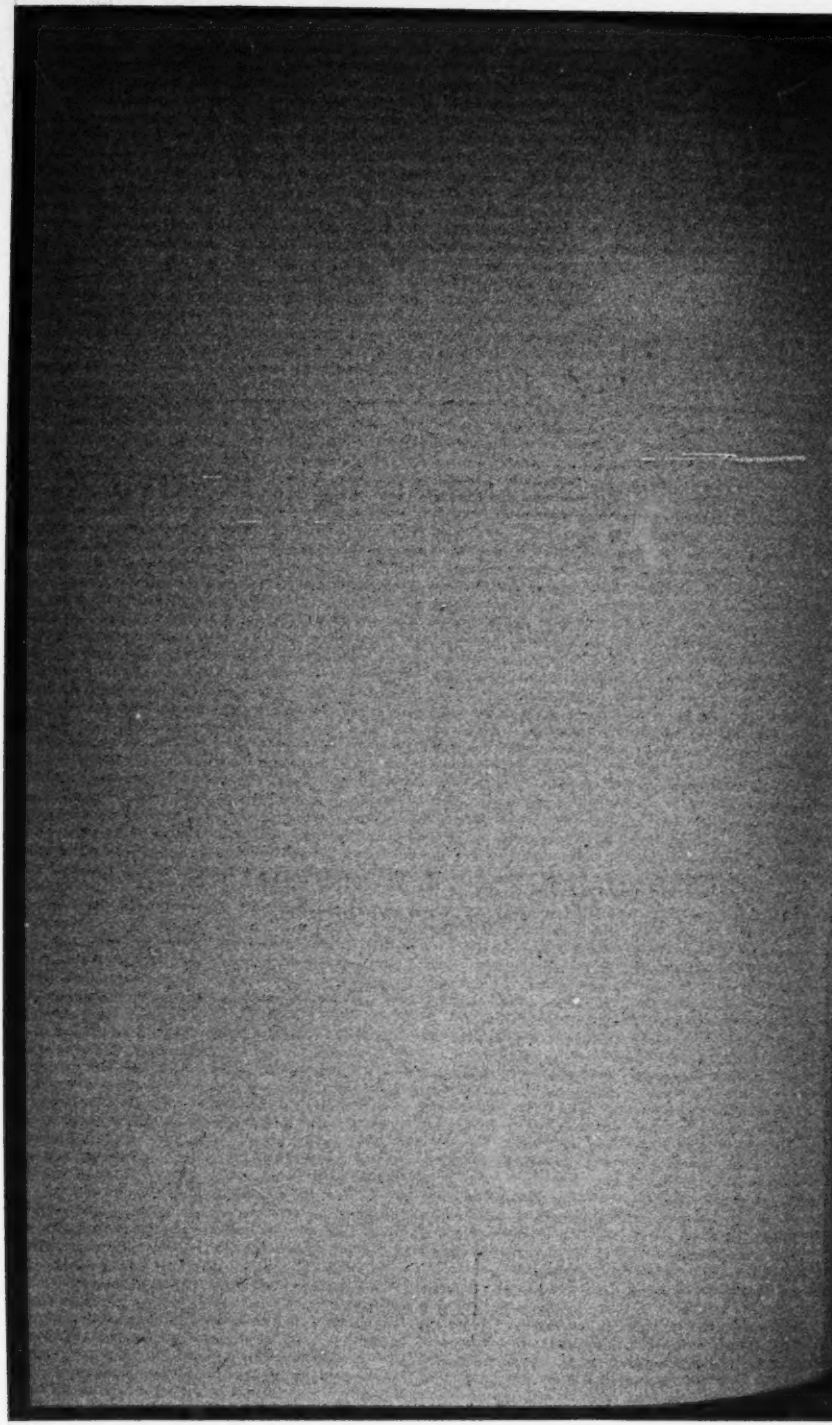
IN THE SUPREME COURT OF THE UNITED STATES

W. L. WELLS COMPANY, Petitioner,

against

GASTONIA COTTON MANUFACTURING COMPANY, Respondent.

Brief of Murray F. Smith, H. C. Jones and Chas. W. Tillett, Counsel for Petitioner.



IN THE SUPREME COURT OF THE UNITED STATES.

W. L. WELLS COMPANY, PETITIONER,

against

GASTONIA COTTON MANUFACTURING COMPANY,
RESPONDENT.

Brief of Murray F. Smith, H. C. Jones and Chas. W. Tillett, Counsel for Petitioner.

PRELIMINARY STATEMENT.

It will appear by reference to the petition for *writ of certiorari* and to the record in this action that the petitioner alleges that it is a corporation created under the laws of the State of Mississippi, and therefore a citizen of the State of Mississippi, and that the defendant is a corporation created under the laws of the State of North Carolina, and therefore a citizen of that State. The action was brought in the Circuit Court of the United States for the Western District of North Carolina by the petitioner, alleging diverse citizenship as a ground of jurisdiction; and this action and one of like nature against Avon Mills (the determination of which awaits the decision in this case) were brought to recover the sum of about sixty-five thousand dollars ($65,000) due for cotton purchased by the defendant and the Avon Mills from the plaintiff. The defendant denied that the plaintiff was a corporation and a citizen of the State of Mississippi. It admitted that it purchased the cotton from the plaintiff at the prices therein named and it set up the plea of partial payment, and admitted it owed a balance.

It is admitted by us that the denial of the corporate existence of the plaintiff and the denial that it was a citizen of the State

of Mississippi raised in the Circuit Court the question of jurisdiction, and this question was passed upon by the Circuit Court in favor of the plaintiff. The Circuit Court also ruled that the defendant had wholly failed to make out its plea of payment, and in as much as the defendant admitted the debt subject to the plea of payment, the Court directed a verdict for the full amount of the plaintiff's demand.

The case was carried by writ of error, sued out by the defendant, to the Circuit Court of Appeals to review the alleged errors of the Circuit Court, first in that the Circuit Court held that it had jurisdiction of the case, and second that the Circuit Court held that the plea of payment had not been sustained.

REASONS WHY WRIT OF CERTIORARI SHOULD BE GRANTED.

It is apparent that the question upon which the decision of the Circuit Court and also the decision of the Circuit Court of Appeals turned was one of jurisdiction. The Circuit Court sustained the jurisdiction upon the ground that the plaintiff was a corporation of the State of Mississippi, and therefore a citizen of that State. The Circuit Court of Appeals reversed the Circuit Court upon this point, and while conceding that the plaintiff was a *de facto* corporation, yet ruled that the Court had no jurisdiction because the plaintiff was not a *de jure* corporation. In other words, the important ruling of the Circuit Court of Appeals, which this Court is asked to review, is whether the Federal Court can inquire into the legality of corporate existence, or whether, if it is shown that a party is a corporation *de facto*, this is conclusive upon the question of the right of such corporation to sue as a citizen of the state under which it was organized and in which it has been doing business.

The case then being one in which the jurisdiction of the Federal Court is involved, it could have been brought directly from the Circuit Court to the Supreme Court under the provisions of the fifth section of the Act of March, 1891. *Shepherd vs. Adams, 168 U. S., 618.* The defendant elected to take the case to the Circuit Court of Appeals instead of bringing it to the Supreme Court upon the jurisdictional question. And the de-

cision of the Circuit Court of Appeals is therefore final unless the Supreme Court should review it upon this petition for certiorari. *Robinson v. Caldwell, 165 U. S., 359.*

If the decision of the Circuit Court had been against the plaintiff upon the question of jurisdiction, the plaintiff likewise could have brought the case directly to the Supreme Court for the determination of that question, and it is now submitted that it is a reason appealing most strongly to the Court for the exercise of its discretion in granting this application for certiorari, that the plaintiff, without any fault on its part, has lost the opportunity *as a matter of right* to have the Supreme Court pass on the question of jurisdiction.

We have found no decision of the Court in which this phase of the question has been treated, but it is earnestly submitted that the Supreme Court should be more favorable to granting of writs of certiorari for the purpose of passing upon questions of jurisdiction where the party applying for the writ was deprived of the opportunity of having the case brought to the Supreme Court by reason of the fact that the decision of the Circuit Court on the jurisdictional question was in his favor.

With this preliminary statement we submit that the Court should grant the writ of certiorari for the following reasons:

1. It is conceded in the opinion of the Circuit Court of Appeals, and, as we understand, is admitted on all sides, that the plaintiff is at least a de facto corporation; and if this be admitted or shown to be true, then there was manifest error in the opinion of the Circuit Court of Appeals in holding that the corporate existence of the plaintiff could be attacked in this action, and in holding that the Federal Court has no jurisdiction of an action brought by a de facto corporation.

2. There was error in the ruling of the Circuit Court of Appeals to the effect that the plaintiff was not a de jure corporation. The Court confused the corporate existence with the franchise to do business. Under the first section of plaintiff's charter, which the Circuit Court of Appeals entirely ignored, the plaintiff was created a corporation by words in praesenti.

3. The Circuit Court of Appeals was also in error in ruling that the payment of ten thousand dollars ($10,000) of capital stock was a condition precedent to the granting of the franchise to do the business of general dealer in cotton; and the Court further ignored or overlooked the fact that at the time of the transactions out of which the cause of action arose the plaintiff company had in its treasury, of profits realized, a sum largely in excess of ten thousand dollars ($10,000).

DISCUSSION OF POINTS INVOLVED.

1. It is conceded in the opinion of the Circuit Court of Appeals, and, as we understand, is admitted on all sides, that the plaintiff is at least a de facto corporation; and if this be admitted or shown to be true, then there was manifest error in the opinion of the Circuit Court of Appeals in holding that the corporate existence of the plaintiff could be attacked in this action, and in holding that the Federal Court has no jurisdiction of an action brought by a de facto corporation.

Although it would possibly be more logical to discuss first the alleged error of the Circuit Court of Appeals in deciding that the plaintiff was not a corporation *de jure*, yet we prefer to discuss first the proposition that, granting for the sake of argument that the plaintiff is not a corporation *de jure*, but, as the Circuit Court of Appeals concedes, is only a corporation *de facto*, then that the Court has jurisdiction, that the plaintiff as a *de facto* corporation is a citizen of the State of Mississippi and that the Court can not in an action of this nature inquire into the legality of the corporate existence.

The plaintiff company was undeniably a *de facto* corporation. The Circuit Court of Appeals in its opinion says that in order for the plaintiff to have standing in the Circuit Court of the United States it must "show the credentials of its birth and existence." It is submitted that the plaintiff has shown these "credentials" by the strongest possible proof.

The error of the Circuit Court of Appeals consists as we respectfully submit in the failure to advert to the fact that a *de facto* corporation has a real existence, is an entity, and does

not owe its existence merely to a question of estoppel. The Supreme Court has most clearly defined the nature of a *de facto* corporation in the case of *Tulare Irrigation District vs. Shepard*, 185 *U. S.*, 1, where it is said "from the authorities some of which are above cited it appears that the requisites to constitute a corporation *de facto* are three: (1) A charter or general law under which a corporation as it purports to be might lawfully be organized; (2) an attempt to organize thereunder; and (3) actual user of the corporate franchise."

We could rest our whole case upon this clear enunciation of "the requisites to constitute a corporation *de facto*." The W. L. Wells Company undoubtedly (1) obtained a charter "under which it might lawfully be organized," (record p. 42); and (2) it undoubtedly made "an attempt to organize thereunder," (record p. 45); and (3) there was undoubtedly "an actual user of the corporate franchise."

When the company was shown to have had this *de facto* existence, then there could be no collateral inquiry into the regularity of the existence. The very fact that it is called a *de facto* corporation presupposes that there is some irregularity in its organization; but it is nevertheless an *actual corporation* and has *actual existence* which can not be collaterally attacked.

In the opinion of the Circuit Court of Appeals it is said that where the corporate existence is denied, that is a direct attack on the existence and is permissible in a case of this character. It is respectfully admitted that a moment's consideration will show the error of the Court; for every attack upon a corporate existence except one made by the state itself is necessarily collateral. If the corporate existence could be called in question merely by denying it and this would be considered a direct attack, then there is error in all of the thousands of cases in which the Courts have held that the corporate existence could not be called in question merely by denying it in a civil action. All of the authorities agree that such a denial is a collateral attack upon the corporate existence.

In the case of *Tulare Irrigation District vs. Shepard*, 185 *U. S.*, 1, already cited, the Court said "being a *de facto* corpora-

tion the general rule is that none but the state can call its existence in question."

And the Court then quotes with approval Cooley Const. Lim., p. 312, as follows:

"In proceedings where the question whether a corporation exists or not arises collaterally, the Courts will not permit its corporate character to be questioned, if it appear to be acting under color law, and recognized by the state as such. * * * And the rule, we apprehend, would be no different if the Constitution itself prescribed the manner of incorporation. Even in such a case, proof that the corporation was acting as such, under legislative action, would be sufficient evidence of right, except as against the state, *and private parties could not enter upon any question of regularity.* And the state itself may justly be precluded, on the principle of estoppel, from raising such an objection, where there has been long acquiescence and recognition."

In *Baltimore and B. P. Company v. Fifth Baptist Church,* 137 *U. S.,* 658, the right of defendant in error to bring a suit as a corporation was questioned, and the Court held that the evidence before it was clearly competent and sufficient, as between these parties, to prove that the plaintiff "had, in good faith, attempted to organize as a corporation, and had long acted as such, and was, at least, a corporation *de facto, which is all that is necessary to enable it to maintain an action against anyone, other than the state, who has contracted with the corporation or who has done it a wrong.*"

In case of *Stout v. Zulick, 48 N. J. Law, 599,* we find the doctrine we are contending for in the following languages:

"And it is entirely settled that the corporate existence of such corporation *de facto* can not be inquired into collaterally. It is, as to all who contract with it, to be assumed to be a corporation *de jure.* The legality of its corporate existence may be inquired into by the state; but not by any one else. And this is as true where the corporation is formed under a general law as it is where the corporate existence is claimed under a special charter."

And likewise in *Trustees vs. Froislie,* 37 *Minn.,* 447, we find the following pertinent language:

"The plaintiffs are at least corporation *de facto*. Such a corporation, at least where there is a law under which a corporation might have been legally formed with such power, is capable of taking and holding property as grantee, as well as a corporation *de jure*, and conveyances to it are valid as to all the world, except the state in proceedings in *quo warranto*, or direct proceedings to inquire into its right to exercise corporate franchises. And in an action by it to recover such property, no private person will be allowed to inquire collaterally into the regularity of its organization. This rule is not founded upon any principle of estoppel, as is sometimes assumed, but upon the broader principles of common justice and public policy. It would be unjust and intolerable if, under such circumstances, every interloper and intruder were allowed thus to take advantage of every informality or irregularity of organization."

From these authorities and hundreds of others that might be cited, it is apparent that when the honorable Circuit Court of Appeals says that the attack made on the corporate existence of the W. L. Wells Company is not a collateral attack, it is at variance with all the authorities and stands alone.

CAN DE FACTO CORPORATION MAINTAIN SUIT IN FEDERAL COURT?

We come then to the question as to whether a *de facto* corporation can maintain a suit in the Federal Court as a citizen of the state under the laws of which it attempted to organize.

We call attention in the first place to the fact that in all of the authorities cited a *de facto* corporation is spoken of as having a real existence. The very use of these words presupposes that it is a legal entity, and if so then it must be a citizen of some state.

This idea is clearly expressed in the leading case of *Society Perun vs. City of Cleveland*, 43 *Ohio St.*, 481 (3 *N. E.*, 357), where it is said: "The argument is that 'no case can be found where it is held that there is a corporation *de facto* against persons who have in no way recognized its existence as a corporation;' and that 'the notion of a *de facto* corporation is based on the doctrine of estoppel; when estoppel can not be invoked, there

can be no *de facto* corporation.' The theory that a *de facto* corporation has no real existence, that it is a mere phantom, to be invoked only by that rule of estoppel which forbids a party who has dealt with a pretended corporation to deny its corporate existence, has no foundation, either in reason or authority. A *de facto* corporation is a reality. It has an actual and substantial legal existence. It is as the term implies, *a corporation.* * * * * "Where it has attempted, in good faith, to assume corporate powers; where its proceedings in that behalf are colorable, and are approved by those officers of the state who are authorized to act in that regard; where it has honestly proceeded for a number of years, without interference from the state, to transact business as a corporation; has been reputed and dealt with as a duly incorporated body, and valuable rights and interests have been acquired and transferred by it, *no substantial reason is suggested why its corporate existence, in a suit involving such transactions, should be subject to attack by any other party than the state, and then only when it is called upon, in a direct proceeding for that purpose, to show by what authority it assumes to be a corporation.*"

It would seem then that there should be no controversy but that a *de facto* corporation is a "citizen" within the meaning of the Federal Statutes which confer jurisdiction on Federal Courts in cases of diverse citizenship. This would be true if the strictest interpretation of the word was required, but the interpretation placed by the Federal Courts upon the word "citizen" (in regard to corporations or quasi-corporations) has been that of great liberality. Thus as said in Carter's Jurisdiction, Federal Courts p. 56, "a majority of cases have held that what are known as joint stock companies may be treated as citizens of the states under whose laws they are organized for all purposes." This was the ruling of Judge Gresham in the case of *Fargo vs. Louisville, etc., R. R., 6 Fed., 787,* and *B. & O. R. R. Company vs. Express Company,* 22 *Fed.* 404. It is also held that a limited partnership may sue as a corporation in the United States Courts. See able and elaborate discussion of the question in *Andrews Company vs. Youngstone Company,* 86 *Fed.,* 585. (*C. C. A.*) See also *Board of Chicot City vs. Crit-*

tenden, 94 *Fed.*, 613, where a Levee Board was allowed to maintain suit as a corporation.

But we find a case directly in point in *Blackburn vs. Selma, etc., R. R. Company, 2 Flipp, 525 (Fed. Cas., No. 1467).* There the defendant sought to evade the jurisdiction of the Federal Courts upon the ground that it was not regularly organized as a corporation; and the very point discussed by the Circuit Court of Appeals in the case at bar was passed upon. The Court says: "It is claimed that the question here is one of jurisdiction, and therefore this doctrine of estoppel does not apply, however it may be in a case where the defence is *non est factum* or some other plea to the merits. * * * *We can not see why this estoppel is not as conclusive to support the jurisdiction as to support the contract.* If a body of citizens shall assume to act as a Tennessee corporation, keep its headquarters and principal offices here as this did, execute bonds and mortgages including property lying in Tennessee, and reciting and showing its Tennessee charter and Legislature as a part of its authority to do these acts, we do not see why its estoppel by them to deny its Tennessee citizenship as well when the Tennessee jurisdiction depends upon it, as when the validity of its contract is called in question. * * * We say, then, that when parties act as a corporation in Tennessee, and claim to be a Tennessee corporation and deal as such, they are estopped to deny that the corporation is a Tennessee corporation when sued in the Federal courts of that State; and they can no more aver their non-user or non-acceptance of the charter under which they have assumed to act against the jurisdiction of the Court in which the corporation is sued than they can aver the fact against the contract itself."

In the leading case of *Louisville, etc., R. R. v. Letson*, 2 Howard, 497, will be found the theory upon which corporations are held to be citizens for jurisdictional purposes: The learned Justice says: "If it (*i. e.*, a corporation) is so (a citizen) for purposes of taxation, why not for purposes of suit in the Federal Court? * * * When a corporation *exercises its powers* in in the State in which it was chartered, that is its *residence*, and such an averment is sufficient to give the Circuit Courts jurisdiction."

If, then, as in the case at bar, the Wells Company was allowed to exercise its corporate powers in the State of Mississippi, then certainly under the liberal construction placed upon the word "citizen" in reference to corporations, this company should be deemed such for all jurisdictional purposes. In support of this construction we find in *Kansas, etc., R. R. v. Santa Fe R. R., 118 U. S., 414*, the following: "In all cases where a Federal court can take jurisdiction of controversies between citizens, it will take jurisdiction of controversies between corporations and *treat them* as citizens of the State under whose laws they were created or *continue to exist.*" If the State of Mississippi permits the Wells Company to exist and exercise corporate powers, it should be deemed a citizen.

In *Handley v. Stutz*, 39 U. S. (Law Ed., 35, p. 229), a suit was brought in Tennessee by certain creditors of the Clifton Coal Company to enforce certain contracts made by that corporation (by citizens of Tennessee, presumably). The Clifton Coal Company had been organized in Kentucky, and the defendant contended that there had been certain irregularities not in accordance with the Kentucky statute, in regard to the capital stock, directors' meetings, etc. The Court held that "under the Kentucky statute a person dealing with a corporation and sued on a contract, can not defend on the ground of a want of legal organization of the corporation." A reading of the opinion will show that the words "under Kentucky statute" are unimportant. If the Court had the power in all suits to look into the organizations of *de facto* corporations before taking jurisdiction, why did it not refuse to recognize the right of the Kentucky corporation to sue in Tennessee until satisfied as to the regularity of its organization? The point would certainly have been raised long before this, had the Federal courts possessed such a power, but not a single case can be found to this effect.

In *Commrs. v. Bolles*, 94 U. S., 104, it is held that "where there is a corporation *de facto*, if not *de jure*, its *corporate existence* and its ability to contract can not be *called in question* in a suit brought upon evidences of debt given to it."

We would call special notice to the words used here. Not only is the proposition laid down that a party dealing with a

de facto corporation can not defend upon ground of irregular organization, but the broadest rule is declared that *no question whatsoever* is to be raised as to the existence of a *de facto* corporation in an action upon evidence of debt. In *Fritz v. Palmer,* 132 U. S., 282: 33 Law Edition, 317, a Missouri corporation, The Comstock Company, was one of the parties interested in a suit in Colorado in regard to certain real estate situate in the latter State, and it was contended that the Comstock Company had not legal capacity to purchase, hold or convey real estate in Colorado. The Court held that the question whether a corporation has taken title to real estate for purposes not authorized by law or in excess of the quantity permitted by its charter concerns *only* the *parent* State; thus the Court absolutely refused to inquire into the relations which exist between a foreign corporation and the State in which it has its existence. This, we contend, has been and should be the attitude of the Federal judiciary as to the question of corporate citizenship. For citizenship as to jurisdiction over corporations means only residence. In support of this contention, see note to *Steamship Co. v. Trigman,* 106 U. S., 27 Law Ed., 87, upon corporate citizenship, citing *Gassies v. Ballow,* 31 U. S., 961, and other cases.

In the Federal Courts there are a number of cases in which *de facto* corporations have been allowed to sue and be sued. Since the question of jurisdiction lies at the threshold of every action, it seems almost incredible that this point should not have been raised, and that some of the judges should not have refused to recognize the existence of *de facto* corporations, according to the contention of the defendant. Especially worthy of notice is the case of the *Young, etc., Co. v. Young Lock-Nut Co.,* 72 Fed. Rep., 63. An action was brought in New Jersey by the plaintiff, a New York corporation; defendant contended that the action could not be maintained because of plaintiff's non-compliance with a New York statute as to capital stock and subscriptions. The Court held that the action might be maintained for "a failure to comply with the statute would not, *ipso facto,* and in the absence of an action by the State, work a dissolution of the corporation or prevent it from recovering its property."

Another strong case is that of *Am., etc., Co. v. City of New*

York, 68 Fed., 227, where it is held that "when a corporation has been organized and taken title to a patent, and no proceeding has been taken to terminate its existence, it may *maintain a suit*, notwithstanding defendant company questions its corporate existence on ground of failure to seasonably commence business."

In *Moxie Food Co. v. Baumback, 32 Fed., 205*, it was contended by defendant that, because certain conditions on the part of plaintiff relative to citizenship of incorporators and manner of manufacturing the products had not been complied with, therefore the Moxie Company, chartered in Maine, was no corporation, and not entitled to sue in the Federal courts in Texas. The Court, after conceding for the purpose of argument, the violations of the conditions, used the following striking language:

"If it had an existence in Maine, it can *sue* (*i. e.*, in Texas). Clearly it had and has an existence in Maine. Whether it manufactured elsewhere in whole or in part is a matter purely between itself and the State of Maine. Maine, its sovereign power, created it a *citizen for all purposes of suit*, * * * and it is for her to deal with this person so far as its *existence* is concerned. It is the only power that can call its existence in *question* when that *existence* has once been actually created. When that certificate was filed in the Secretary of State's office, it was a being. * * * It is a thing of life; it can sue and be sued." Continuing, the Court said: "Is it (*i. e.*, the violation of conditions) not *exclusively* a matter between itself and its parent? I think it is. When it sues in a court, the only question the *Court can try* is, not whether it has disappointed the reasonable expectations of its parent, or creator, but whether, *in point of fact*, such person has a legal existence. If it has, the suit must go on."

In *Oregon, etc., Ry. v. Oregon Ry. and Nav. Co.*, 23 Fed. Rep., 232, the plaintiff, a corporation *ostensibly* formed (defectively) in Great Britain, sued defendant, an Oregon corporation, in that State, and defendant defended on ground that plaintiff was no corporation, specifying grounds for its belief, plaintiff merely demurred to answer and seems not to have offered proofs of its incorporation. Court held, however, that defendant was estopped to deny the existence of an *ostensible*

corporation with which it has contracted. The action was brought in the Circuit Court of Oregon in 1885 upon a lease. It must have been brought under the act of 1883, and surely if the Circuit Court had possessed any power to inquire into the regularity of corporate organization, it would have done so before taking jurisdiction of this ostensible British corporation against a citizen of Oregon.

The principles of estoppel, proof of *de facto* existence, and the non-allowance of collateral attack, run so close together in many of the cases that it seems hardly necessary to separate them. In the following cases, however, it is held in *ipsissimis verbis* that a *de facto* corporation can not be collaterally attacked or questioned except in a direct proceeding for that purpose by the parent State:

Armour v. E. Bements, etc., 123 Fed. Rep., 56;
Ryland v. Hallinger, 117 Fed. Rep., 216;
Am. etc., Co. v. City of N. Y., 68 Fed. Rep., 227;
Miller v. Perry, etc., District, 85 Fed. Rep., 693;
Andrews v. Pipe and Foundry Co., 77 Fed. Rep., 774;
Young Rev. Lock Co. v. Young, etc., Co., 72 Fed. Rep., 67;
Lessee of Frost v. Frostburg, etc., Co., 65 W. S., Law Ed., p. 637;
Columbia, etc., Co. v. Freem, etc., 71 Fed. Rep., 392;
Jones v. Habersham, 107 U. S., 27 Law Ed., 403;
Moxie Food Co. v. Baumtack, 32 Fed. Rep., 205;
Fritz v. Palmer, 132 U. S., 25 Law Ed., 1050;
Whitney v. Wyman, 101 U. S., 25 Law Ed., 1051;
Macon v. Shores, 97 U. S., 24 Law Ed., 890;
Ralls County v. Douglass, 101 U. S., 26 Law Ed., 958.

In the following cases it has been held that proof of *de facto* corporate existence is all that is necessary to maintain an action in a Federal Court:

Balto. and P. R. R. v. Baptist Church, 137 U. S., 568;
Bank of U. S. v. Dandridge, 25 U. S., 64;
Conrad v. Ins. Co., 26 U. S., 386;
Tulare Irrigation Dist. v. Shepard, 185 U. S., 46 Law Ed., 773.

In the following cases, the parties to suit or action have been held to be estopped to set up the irregularity of the corporate organization of a *de facto* corporate body, which was party to the suit:

Bank v. Matthews, 98 U. S., 621;
Wallace v. Loomis, 97 U. S., Law Ed., 24, p. 895;
Automatic, etc., Co. v. N. Am., etc., 83 Fed. Rep., 232, p. 1;
Chubb v. Upton, 95 U. S., 65;
Close v. Cemetery, 107 U. S., 27 Law Ed., 409;
Oregon, etc., Ry. v. Oregon, etc., Ry., 23 Fed. Rep., 232.

Though we have attempted to carefully distinguish these cases on account of their wording and difference of statement, nevertheless through them all there runs the one great fundamental principle with which we began this argument, namely, that a *de facto* corporation is as real a legal entity or person, to all intents and purposes, as a *de jure* corporation, except when its existence is brought into question by a direct proceeding on the part of the parent State. Therefore, the conclusion almost irresistably follows that if the Wells Company was a *de facto* corporation in Mississippi, the Federal courts are bound to recognize it as a citizen of Mississippi for all purposes of jurisdiction, since as long as the parent State of Mississippi continues to treat this corporation as its legitimate child no one else has the right to say that it is an illegitimate.

2. There was error in the ruling of the Circuit Court of Appeals to the effect that the plaintiff was not a de jure corporation. The Court confused the corporate existence with the franchise to do business. Under the first section of plaintiff's charter, which the Circuit Court of Appeals entirely ignored, the plaintiff was created a corporation by words in praesenti.

THE PLAINTIFF A CORPORATION *DE JURE*.

We have argued the alleged error of the Circuit Court of Appeals upon the assumption that that Court was right in ruling

that the Wells Company was only a *de facto* corporation, but we now submit, with the utmost confidence, that the undisputed facts in the case show that the plaintiff was a corporation *de jure*, brought into existence in the strictest legal conformity with the provisions of the State of Mississippi.

We call attention to the first section of the plaintiff's charter (record, p. 42), in which the incorporators "are hereby created a body politic and corporate." No language could be used which would more strongly grant by words *in praesenti* a grant of corporate existence. The Mississippi statute, which is set forth in the petition for *writ of certiorari*, provides: "The powers therein specified shall, by the approval of the charter, be vested in such corporation, and it shall go into operation at the time and on the terms and conditions therein specified." This provision would seem to imply that it was only necessary that the Governor approve the charter in order that the powers therein specified be vested in the corporation. But however this may be, certainly no one can doubt but that when the incorporators met as they did and formally accepted the charter (record, p. 45), then a full-fledged *de jure* corporation came into existence. It may be that this corporation was not fully empowered to go into the cotton business until ten thousand dollars ($10,000) of stock was paid in, but nevertheless it had in the strictest sense a legal existence as a corporation, and became a citizen of the State of Mississippi as much so as a child born in Mississippi of parents residing there. Indeed, in this aspect of the case, it may well be likened to such a child, who undoubtedly had at its birth a legal existence and became a citizen of the State of Mississippi, and yet could not transact any business whatever. We are conceding here, for the sake of the argument, that the payment of ten thousand dollars ($10,000) capital stock was a condition precedent to its right to do business. We shall presently show, however, that this is not a proper interpretation of section two of the chapter. It will be noted that in the opinion of the learned Circuit Court of Appeals the first section of the plaintiff's charter was entirely ignored or overlooked in the discussion by the Court of the question at issue. It is respectfully submitted that the Court confused the question of the corporate

existence with the question of the right of the corporation to do the business for which it was organized, viz., that of general dealer in cotton. This distinction is very clearly drawn by the Supreme Court in the case of *Julian v. Central Trust Company and the Southern Railway Company*, in opinion filed on February 23, 1904. This case cites with approval the case of *Memphis R. R. Company v. Commissioners, 112 U. S., 819*, where it is said "the essential properties of corporate existence are quite distinct from the franchise of the corporation. The franchise of being a corporation belongs to the incorporators; while the powers and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all its property and all its franchises."

It is plain, we submit, that the incorporators acquired "the franchise of being a corporation," when the charter was granted and the corporators accepted it, although it may be conceded for the sake of argument that the corporation itself did not acquire the franchise of doing a cotton business until the ten thousand dollars ($10,000) of stock was paid in. If the corporate existence was complete then, the plaintiff undoubtedly became a citizen of the State of Mississippi within the meaning of the U. S. statutes which give the Federal courts jurisdiction in cases of diverse citizenship.

It may not be denied that there are charters granted which, by their terms, forbid that the "franchise of being a corporation" shall be assumed by the incorporators until certain conditions precedent have been complied with. But we submit that the case at bar does not by the most strained construction of its charter fall in that class. As before stated, there was nothing for the corporation to do to attain a legal existence except possibly for the incorporators to accept the charter, or do some act showing that they accepted it. In the case of *Perkins v. Sanders, 56 Miss., 733*, the question at issue is very ably discussed. The Court, speaking of the charter under discussion, says:

"The charter of this company is not of that character. By

the first section of it, 'and all others who are now or may hereafter become associated with them, and their successors and assigns, be, and they are hereby, created a body politic and corporate, under the name and style of the Perkinsville Manufacturing Company,' etc. This was no proposition to create a corporation under the performance of precedent conditions, but it was itself the creation of a corporation, requiring no other act to be performed by the corporators than their acceptance of the charter; and this, even, was unnecessary, if, as it is probable, the corporators had applied for the grant of the charter, and thus accepted it in advance. Action under the charter would be an acceptance of it, and hence there could never be any question as to the existence and due organization of the corporation when determining upon the validity of a corporate act done within its charter powers; for the performance of the act itself would be an acceptance of the charter.

"The distinction between the two classes of charters is thus seen to be that in the first class the charter is a mere permission on the part of the Legislature for the formation of a corporation, upon the doing of certain acts prescribed in the charter as precedent conditions, and, as a necessary result, no corporate act can be done until these conditions have been performed, except such as may be expressly permitted by the charter; and to those acts, it would be considered that the corporation had an existence before its full investure with its corporate franchise.

"In the latter class, in which is this company, the corporation is in existence, for all the purposes of its creation, from the beginning, except so far as there may be restraints placed on it by the charter, either expressly or by plain implication."

In the case of *St. Joseph, etc., R. R. v. Shambaugh, 166 Mo., 567*, the Court uses this language: "The charter confers corporate capacity without condition precedent, and acceptance of the charter is all that need be shown. In such cases, the act of incorporation brings the corporate body into existence. The act of January 22, 1857, declares that there is hereby created a company, called the St. Joseph and Iowa Railway Company, with a capital stock of $2,000,000, and then goes on to designate

the persons who shall constitute the first board of directors. No conditions are prescribed. It is a present grant of corporate powers."

Numberless other authorities could be cited to the same effect, but it is submited that in view of the plain provisions of the charter of the plaintiff, the first section of which creates it a corporation without condition precedent, it is unnecessary to multiply decisions.

3. The Circuit Court of Appeals was also in error in ruling that the payment of ten thousand dollars of capital stock was a condition precedent to the granting of the franchise to do the business of a general dealer in cotton; and the Court further ignored or overlooked the fact that at the time of the transactions out of which the cause of action arose the plaintiff company had in its treasury of the profits already realized a sum largely in excess of ten thousand dollars.

(*a*) We have already endeavored to show that the existence of the corporation was in no sense dependent upon the company's right to do business, conceding that by a proper interpretation of the second section of the plaintiff's charter the payment of ten thousand dollars of capital stock was made a condition precedent to its right to do business. We now submit that a proper interpretation of the second section, along with the remaining sections of the charter, clearly shows, not only that the right of existence as a corporation was not dependent on the payment of ten thousand dollars of capital stock, but also that the payment of this amount of capital stock was not even a condition precedent to the right of the company to do the business for which it was organized, viz., that of general dealer in cotton.

The language of the second section of the charter (record, p. 42) is: "As soon as ten thousand dollars of said stock is subscribed and paid for, said corporation shall have power to commence business." It is submitted that this language does not make the payment of the ten thousand dollars a condition precedent to the right to commence business.

In the case of *Whitney v. Wyman, 101 U. S., 392*, the statute under which the corporation in question was organized declared

that the articles of association should be filed with the Secretary of State before the corporation should commence business. The corporation attempted to do business before its articles were filed as required, and the Court, discussing this phase of the case, among other things, said: "The restriction imposed by the statute is a simple inhibition. It did not declare that what was done should be void, nor was any penalty prescribed. No one but the State could object."

In the case of *Hammond v. Strauss, 53 Md., 1,* there was a charter strikingly like the one in the case at bar, except that its prohibitive features were much stronger. The Court said: "An act of the Legislature of the State of Maryland, by the first section, declared the parties therein named and their successors in office to be, and they are hereby, constituted and made a body corporate and politic, under the name and style of The Union Banking Company of Baltimore." The fourth section of this act provided that when "twenty-five per cent of the minimum capital stock shall have been paid in and so certified by the majority of said corporation, to the Treasurer and Comptroller of the State, and a certificate of their organization transmitted to the Court of Appeals to be by him recorded in his office, and *not before* shall they be entitled to all the benefits and privileges herein conveyed or intended to be conveyed." This twenty-five per cent was not paid in and no certificate was filed, yet the Court in that case uses this language: "There is nothing in this language that imports a condition precedent to the existence of a corporation." Further along the Court said: "As we have seen the act by its terms constitute and declare the incorporators therein named a body corporate; and upon their acceptance of the act, if it was accepted, the corporation was brought into existence without anything more, by the force of the statute itself. There was no condition precedent prescribed to the mere existence of the corporation, after the acceptance of a charter, and in such cases it has often been decided that the corporation is *in esse.*"

And in the case of *Harrod v. Hammer, 32 Wis., 162,* the following language is used: "The corporation was organized under chapter 73 of the Revised Statutes. It is not objected

or shown that any requirements of the statute was omitted or not complied with, except only that the certificate prescribed by section 17, and was not made and deposited with the Secretary of State, and a duplicate with the village or city clerk, as therein directed. The only question, therefore, is whether this failure of the president and directors to make and deposit the certificate and duplicate, operated to defeat the organization or to annul the proceedings by which the corporation was brought into existence. The very words of the section are a sufficient answer—'That before any corporation, formed and established by virtue of the provisions of this law, shall commence business, the president and directors shall cause their articles of association to be published,' etc., and 'shall make a certificate,' etc. It would not be easy by any words to recognize the existence of the corporation without the publication and without the certificate, or before they are made, more clearly than has been done here. The corporate existence is clearly acknowledged, and intended to be so, and the prohibition is only against it commencing business until the requirements are complied with. It is spoken of as a corporation formed and established by virtue of the provisions of law."

We deem it unnecessary to present any further authorities, and submit that the provisions of the second section of the plaintiff's charter in regard to its commencing business, was, as the Supreme Court of the United States says in the case of *Whitney v. Wyman, supra,* "a simple inhibition."

(*b*) Discussing the second branch of the third proposition upon which we rely, we call the attention of the Court to the fact that in the discussion of the questions at issue the Honorable Circuit Court of Appeals did not give the proper weight, if any at all, to the admitted fact that at the time of the transactions out of which the cause of action arose, the company had already made net profits amounting to $37,000, all of which was still in the treasury except about $4,000, drawn out by two of the stockholders (see testimony of Jno. T. Wells, record, p. 34). Besides this, it was shown that before the company did any business at all, W. L. Wells had loaned the company $10,000 (record, p. 34).

Conceding that the company was compelled to have capital amounting to $10,000 before it commenced business, it is difficult to see why this requirement was not complied with as soon as the company had realized net profits aggregating that amount, which were left in the treasury. It surely can make no difference whether this was actually paid in by the stockholders or had been realized as profits. No amount of refinement can do away with the fact that the necessary capital was in the treasury and remained there.

In addition to this, as noted above, W. L. Wells had loaned the company $10,000, and he, as one of the stockholders, would have been estopped to withdraw that amount from the company, provided it was necessary that the company should have had that sum as capital before it began to do business.

If, as we have argued, the corporation had come into existence either *de facto* or *de jure*, it could make no difference that the capital stock was not issued, or that regular corporate meetings were not held. The witness stated that directors' meetings were frequently held. But, at any rate, if the corporation had had an existence, this existence certainly was not terminated by a failure of the company to have meetings, nor its failure to issue stock, nor by its permitting its stockholders to withdraw a small part of the profits without declaring regular dividends. There is absolutely nothing in the case from beginning to end from which any bad faith on the part of the incorporators is shown, and certainly nothing of which the defendant can complain in view of the fact that the plaintiff company had large profits in the treasury at the time of the transaction out of which the suit arose. It is a singular proposition that the defendant, being admittedly indebted to the plaintiff and on a contract incurred with it in its capacity as a corporation, could now be allowed to defeat the recovery upon the ground that the stock of the plaintiff was not originally paid in. Mr. Justice Brewer passed on this very question in the case of *Coal Co. v. Maxwell, 22 Fed., 197*, where he expressly ruled that after persons had dealt with a company as a corporation, they could not afterwards claim that it was a partnership.

OTHER POINTS INVOLVED IN THE CASE.

It is not deemed necessary by us at this stage of the case to discuss the only remaining point in the case, and the one which was not passed on by the Circuit Court of Appeals, namely, as to whether there was any evidence that the plaintiff company authorized the appropriation of any part of the money due it for cotton to the payment of a stock subscription in another corporation made by W. L. Wells individually, or whether the company had ratified any such appropriation. The written opinion of his Honor, Judge Boyd, disposes of this question, and an examination of the record and of the authorities cited in Judge Boyd's opinion will amply sustain the view taken by him. Besides this, we submit that the plaintiff may rely upon the presumption that the ruling of the Circuit Court is correct, at least in so far as to render it unnecessary to discuss that ruling, which remains undisturbed by the opinion of the Circuit Court of Appeals.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 237.

W. L. WELLS COMPANY, PETITIONER,

vs.

GASTONIA COTTON MANUFACTURING COMPANY.

BRIEF FOR PETITIONER.

MURRAY F. SMITH,
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Issues Relating to Jurisdiction.

The issues relating to the jurisdiction here presented are sharply and unmistakably defined, and the principles involved are, we respectfully submit, not only distinctively elemental, but unusually simple, considering the bulk of the record and the surprising result reached.

We will endeavor to state them briefly and concisely.

FIRST.

The plaintiff is unquestionably in possession of a charter obtained under the general laws of the State of Mississippi, in the form prescribed and containing only provisions authorized by said laws, properly and duly approved by the governor of Mississippi, with the great seal of that State attached, and has been undeniably doing business as a buyer

and seller of cotton for several years, using the franchises conferred by, and claiming to have been regularly organized under said charter, and the defendant is a corporation organized under the laws of the State of North Carolina, and engaged in the business of manufacturing cotton fabrics.

Can this defendant dealing and contracting with this plaintiff for nearly three years, comprising three cotton seasons, 1898–1899, 1899–1900, 1900–1901; buying from time to time, from plaintiff as such a corporation, cotton, upon a credit, aggregating in value many thousands of dollars; accepting, without protest or objection, invoices for such cotton from plaintiff in its corporate name; remitting plaintiff, as such corporation, many thousand dollars in settlement of cotton so purchased; conducting a voluminous correspondence with plaintiff as a corporation; actually accounting at the closing of one season's transactions, 1898–1899, with plaintiff and paying in full, and in all instances, and at all times, recognizing plaintiff as a corporation; addressing it only by its corporate title, also always used by plaintiff; its representative and manager even *admitting* on the witness stand that he actually knew of the existence of the plaintiff; and finally, after contracting a liability to plaintiff as such corporation, under and by its corporate name, for cotton purchased and unpaid, amounting, on the 7th day of October, 1901, to $35,397.99, exclusive of interest, being the balance then due, when sued in a Federal court for said balance, escape or avoid further accountability and responsibility for this indebtedness (which must, of course, be admitted to be just, correct, and due in determining this question), by *any* suggestion or pleading, in any *manner, shape, or form, that plaintiff is not a corporation*, and therefore cannot recover from the defendant the proceeds of said cotton thus sold and delivered as a corporation, and under its corporate name by it to defendant, at the latter's special instance and request?

SECOND.

Can an attack by such a defendant, under such a state of facts, upon the corporate character of such a plaintiff be sustained in a Federal court, by any assumption that such an attack, which is intrinsically and necessarily *collateral*, becomes *direct*, because embodied in the pleadings?

THIRD.

Can a Federal court *ex mero motu* under this state of facts, with the parties plaintiff and defendant, in the attitude mentioned, relieve the defendant from liability for a just and honest debt by instituting, in a *collateral* what the State of Mississippi could *only do* in a *direct* proceeding, an inquiry into the organization of the defendant as a corporation, and adjudge it to be illegal and void, and without standing in court?

FOURTH.

Can a Federal court refuse to entertain jurisdiction of a suit by a foreign and non-resident *de facto* corporation against a resident corporation, in the district and State where defendant resides, and of which it was a citizen, to recover an indebtedness of $35,397.99 and interest, *solely* because plaintiff is a corporation *de facto*?

FIFTH.

Can a Federal court, while practically admitting "the fact that as to certain persons, and in certain transactions it (the plaintiff) may be a corporation *de facto*," yet deny hearing to such a corporation when impleading *one of these "persons" from liability growing out of these "transactions"*?

SIXTH.

Can a Federal court, in dealing with the question of its jurisdiction, ignore the fact that the defendant is estopped from denying the plaintiff's existence as a corporation, and that the plaintiff is at least a corporation *de facto*?

SEVENTH.

Can the ruling recognized by the appellate court below, that the corporate existence of the plaintiff cannot be collaterally attacked, be ignored because the plaintiff's averment that it *is* a corporation is traversed by defendant, or the doctrine maintained that in this case there is no collateral attack, for the reason that the plaintiff below "itself put that question directly in issue"?

EIGHTH.

When it must be admitted that W. L. Wells, John T. Wells, and George Butterworth applied for a charter, under the laws of the State of Mississippi, and received and accepted such charter, duly approved by the governor of the State of Mississippi, with the great seal of the State of Mississippi attached, and was duly recorded in the office of the Secretary of the State of Mississippi and in the office of the chancery clerk of Warren county, the domicile of said corporation, which charter, by its very first section, created them "a body politic and corporate, under the name and style of W. L. Wells Company, and by that name shall have succession for fifty years; shall have power to sue and be sued, contract and be contracted with; may have a corporate seal, and break and alter the same at pleasure;" and after said incorporators, on the 18th day of July, 1898, *read* and *adopted* said charter, opened books of subscription, when W. L. Wells subscribed for ten shares, John T. Wells subscribed for five

shares, and George Butterworth subscribed for five shares, all of the value of five hundred ($500) dollars each, and on the same day and at the same place held a stockholders meeting, when the said W. L. Wells, John T. Wells, and George Butterworth were elected directors, and that subsequently W. L. Wells was elected president, George Butterworth vice-president, and John T. Wells secretary and treasurer, and thereupon *did business as a corporation* for *nearly three years* with the defendant; and when the only witness upon the subject, John T. Wells, secretary and treasurer of the said corporation, swears that the capital stock subscribed for was paid for "out of the profits of the first year's business" (R., p. 20), the evidence of said profit being on the books, and the said books being introduced on the trial of this case (R., p. 17), and when it is shown indisputably that the said W. L. Wells Company made the first year about $37,000 net profits (R., p. 34), and the second year from $24,000 to $25,000 (R., p. 34), a total of about $61,000 or $62,000, and that John T. Wells, the secretary and treasurer, only drew out the first year $1,813.23 and the second year $3,008.91, a total of $4,822.14 (R., p. 34); that Mr. Butterworth, the vice-president, drew out the first year $2,343.44 and the second year $3,741.55, a total of $6,084.99 (R., p. 34), and that W. L. Wells, president, drew out the first year $238.81 and the second year $12,136.81, a total of $12,375.62, making an aggregate of $23,282.75, leaving in the treasury of the corporation at the end of the first year about $32,604.52 and at the end of the second year over $37,717.25, can it be adjudicated that the W. L. Wells Company, at the instance of the defendant, indebted to it in the sum of $35,397.99, contracted after the first year's profits had accrued and was in the treasury, or upon the suggestion of the court in considering the question of jurisdiction, is not a corporation *de jure*, because section 2 of the charter prescribed: "The capital stock of said corporation shall be $50,000, divided in shares of $500 each, and as soon as $10,000 of said stock is subscribed and

paid for said corporation shall have power to *commence business*"?

NINTH.

Can it be held that such an organization is not *even* a corporation *de facto*, at the instance of a defendant justly indebted to it, when, in addition to the facts already stated, the defendant admits in its pleadings "the said bales of cotton were duly received by the defendant, on the invoices from a corporation, or partnership styled the W. L. Wells Company" (R., p. 8), and further admits that "the sum of $7,285.46 is due on account of the purchase of said cotton," and "it is ready and willing to pay the same, in full settlement" (R., p. 9), and denies "that it owes the plaintiff (necessarily W. L. Wells Company, a corporation) anything except the said balance of $7,285.46" (R., p. 9); and when the defendant in open court, as shown by the bill of exceptions (R., pp. 15 and 16), "*admitted that it had received from a firm or corporation called the W. L. Wells Company, cotton as set forth in the complaint, and that the charges for the same were correct*, as stated in the complaint," and, after denying that the plaintiff was a corporation, and averring that a larger amount had been paid on the claim than plaintiff admitted, then further "admitted owing the balance to the firm or corporation known as the W. L. Wells Company"?

TENTH.

Can this case be treated as if a creditor of the plaintiff was denying its corporate existence, and suing W. L. Wells, John T. Wells, and George Butterworth, *not* for unpaid subscription to the capital stock, but as *partners*, and could a creditor maintain such a suit?

These questions were all in effect decided favorably to the appellant in the Circuit Court of the United States for the

Western District of North Carolina, and adversely to the appellant in the United States Circuit Court of Appeals for the Fourth Circuit, and the judgment rendered in favor of appellant, by said Circuit Court, against the said Gastonia Cotton Manufacturing Company for $39,313.88 (R., p. 11) was reversed, and the appellant, W. L. Wells Company, deprived of the right to sue as a corporation. There was another suit instituted in the said court by the said appellant, the W. L. Wells Company, against the Avon Mills, also managed by John F. Love, the manager of defendant, in which a judgment for a large amount of money was recovered, and said suit, as shown by the agreement in the record (R., p. 14), awaits the determination of this suit, it being agreed that only "one writ of error shall be taken out." So that this case practically involves two suits. The testimony of John T. Wells, secretary and treasurer, shows that the Avon mills owed the plaintiff, at the time of the trial, $26,750.36, exclusive of interest (R., p. 17).

Statement of the Case.

We append an abstract of the material facts relating to the

"Question of Jurisdiction."

W. L. Wells, who had, prior to the summer of 1898, carried on business as a cotton-buyer at Vicksburg, Mississippi, under the name of W. L. Wells and Company, and John T. Wells, who had been for years a book-keeper of the Delta Trust and Banking Company of said city, and George Butterworth, a cotton-buyer residing in Yazoo county, Mississippi, applied in April, 1898, for a charter for a corporation under the laws of the State of Mississippi, to be known as the W. L. Wells Company. This charter was duly approved by the governor of the State of Mississippi on June 1st, 1898 (R., p. 41), and he caused the great seal of the State of Mississippi to be affixed, and it was duly recorded by the Secretary of State in the book of incorporations in his office on the same day (R., p. 42) and by the Chancery Clerk of Warren county, in his office, on the 19th day of July, 1898 (R., p. 41).

On the 18th day of July, 1898, the incorporators of the W. L. Wells Company, to wit, W. L. Wells, John T. Wells, and George Butterworth, met and accepted the charter and opened books of subscription, and thereupon W. L. Wells subscribed for ten shares of stock, John T. Wells for five shares, and George Butterworth for five shares, all of the par value of five hundred dollars each, making the full amount of ten thousand dollars prescribed by the charter to be subscribed and paid (R., p. 45). On the same date a meeting of the stockholders of the corporation was held and W. L. Wells, John T. Wells, and George Butterworth were elected directors (R., p. 46). The charter is as follows:

"THE CHARTER OF INCORPORATION OF THE W. L. WELLS COMPANY.

"SECTION 1. Be it known and remembered that W. L. Wells, John T. Wells, and George Butterworth, their associates and assigns, are hereby created a body politic and corporate, under the name and style of W. L. Wells Company, and by that name shall have succession for fifty years, shall have power to sue and be sued, contract and be contracted with, may have a corporate seal, and break and alter the same at pleasure.

"SECTION 2. The capital stock of said corporation shall be fifty thousand dollars, divided into shares of five hundred dollars each, and as soon as ten thousand dollars of said stock is subscribed and paid for, said corporation shall have power to commence business.

"SECTION 3. Said corporation is formed for the purpose of conducting a general cotton business, and may buy and sell cotton, and may transact a cotton factorage business, may advance money or supplies for the purpose of controlling shipments of cotton, may take and receive mortgages or deeds of trust upon property to secure said advances, and generally may have all powers conferred by chapter 25 of the Annotated Code of 1892, necessary and requisite to carry out the purpose of said corporation.

"SECTION 4. The board of directors of said corporation shall consist of three persons, whose numbers may be increased at any time by a majority vote of the stockholders, and said directors shall have power to elect all necessary officers, and prescribe the duties, salaries and tenure of such officers.

"The foregoing proposed charter of incorporation is respectfully referred to the honorable attorney general for his advice as to the constitutionality and legality of the provisions thereof.

"A. J. MCLAURIN, *Governor.*

"JACKSON, MISS., *April 26th*, 1898.

"The provisions of the foregoing proposed charter of incorporation are not violative of the constitution or laws of the State.

"WILEY N. NASH,
"*Attorney General.*

"JACKSON, MISS., *April —*, 1898.

"EXECUTIVE OFFICE.

"[State coat of arms.]

"JACKSON, MISSISSIPPI.

"The within and foregoing charter of incorporation of the W. L. Wells Company is hereby approved.

"In testimony whereof, I have hereunto set my hand, and caused the great seal of the State of Mississippi to be affixed this 1st day of June, 1898.

"[Great Seal of the State of Mississippi.]

"By the Governor: A. J. McLAURIN.

"J. L. POWER,
"*Secretary of State.*"

(R., pp. 42 and 43.)

It was shown by the testimony of John T. Wells, a witness for plaintiff (some of the facts being elicited on examination-in-chief, and others on cross-examination, and all being uncontradicted), that W. L. Wells was president, George Butterworth vice-president, and John T. Wells secretary and treasurer (R., p. 21); that the capital stock was "paid out of the profits of the first year's business" (R., p. 20), the corporation commencing business about the beginning of the cotton season, September 1, 1898.

The corporation had a seal (R., p. 26) and held several meetings in Vicksburg, at which either W. L. Wells and John T. Wells or W. L. Wells, John T. Wells, and George Butterworth were present (R., p. 26). None of the officers and directors was entitled to any salary, but received his compensation out of the profits, the president being entitled to one-half, the vice-president one-quarter, and the secretary and treasurer to the remaining one-quarter of the net profits (R., p. 29).

The president, W. L. Wells, loaned the company some money, $10,000 (R., p. 34), and furnished most of its credit (R., p. 30). Mr. Butterworth bought cotton for the com-

pany (R., p. 30), and made a trip to England in its interest (R., p. 38). John T. Wells was bookkeeper and office-man. W. L. Wells made contracts and transacted the business of the company in North Carolina.

W. L. Wells loaned the company ten thousand dollars on November 14, 1898, which was repaid June 24, 1899 (R., p. 34). The net profits of the company the first year were about $37,000 (R., p. 34), and about $24,000 or $25,000 for the second year (R., p. 34).

John T. Wells, whose share of the profits would have been about $15,000 or about $12,500 less the $2,500, the amount of his subscription to the capital stock, only drew out of the treasury the first year $1,813.23, and the second year $3,008.91 (R., p. 34), leaving a net balance due him at the end of the *first* year of over $4,900, and of the second year, after the payment of his subscription to the capital stock, of over $7,900.

George Butterworth, who, at the end of the second year, was entitled to over $15,000, and deducting the amount of his subscription, $2,500, to over $12,500, only drew out the first year $2,343.44, and the second year $3,741.55 (R., p. 34), leaving a balance due him, after the payment of his subscription to the capital stock at the end of the second year, of over $6,400, and a balance due him at the end of the first year of over $4,400.

W. L. Wells, who would have been entitled, at the end of the first year, to $18,500 of the profits, less his subscription to the capital stock of $5,000, or a total of about $13,500, only drew out the first year $238.81 (R., p. 34), and at the end of the second year, when his interest amounted to over $25,000 net, after the payment of his subscription to the capital stock, only drew out $12,136.81 (R., p. 34), leaving a balance in the treasury to which he would be entitled of over $13,000. So that it appears at the end of the first year, after deducting the amount drawn by each of the stockholders, and after deducting the $10,000 subscribed to the capital

stock, there was still in the treasury over $22,000, and with the original capital over $32,000, and this was the year in which the business was carried on with the defendant, *without any pretense on its part that the plaintiff was not a corporation, and the year in which the accounts were satisfactorily adjusted and closed.*

At the end of the second year, after deducting the subscription to the capital stock and all sums withdrawn by each of the stockholders, there was still in the treasury fully $27,000 or more, and with the capital stock over $37,000, and at the end of this season September 1, 1900, the defendant only owed plaintiff $6,998.13 (R., p. 19).

The corporation obtained money from the Merchants' National Bank of Vicksburg, owing it during the first year as high as $60,000, or more; on January 4, 1900, owing it as much as $166,000, and during the season of 1900–1901 at one time $128,000, and was still owing said bank at the time of the trial $27,100.19, exclusive of interest, but owed practically no other debts (R., p. 37).

The W. L. Wells Company did business, as stated, with the defendant, and with the Avon mills, and another mill known as the "Ozark mills," all under the management of J. F. Love, officially designated as J. F. Love, Treasurer, and it is undenied that the defendant bought cotton from the plaintiff in *its corporate* name during *the season of* 1898 *and* 1899, and that the business for that season was satisfactory, and all money due for the purchase of said cotton had been accounted for and paid.

Mr. Love, the main witness for defendant, on cross-examination (R., p. 72), is asked:

"Q. You continued to do business with W. L. Wells & Co. until the season of 1898 and 1899; when you did business with the W. L. Wells Co.?

"A. Yes sir."

He was further asked (R., p. 72):

"Q. Didn't you, on Sept. 22d, 1898, address Messrs. W. L. Wells Company, Vicksburg, Mississippi, Gentlemen, etc.? You wrote to W. L. Wells Company on September 22d?

"A. Yes sir" (R., p. 72).

"Q. Didn't you get a letter on Sept. 23rd from W. L. Wells Co.?

"A. Yes sir" (R., p. 73).

"Q. Then you knew of the existence of the W. L. Wells Company?

"A. Yes sir" (R., p. 73).

"Q. Your business had been very satisfactory with the Wells Company?

"A. Yes sir.

"Q. They bought you exactly the kind of cotton you wanted?

"A. Yes sir.

"Q. Had no complaint to make?

"A. None.

"Q. That continued through the whole dealings?

"A. Yes sir.

"Q. You wound up the season of 1898–1899 not owing anything?

"A. According to our books, yes sir" (R., p. 73).

The letters of W. L. Wells Company to John F. Love, Treasurer, contained the following letter-heads:

"W. L. Wells, President. John T. Wells, Sec't'y and Treas. George Butterworth, Vice-Pres't.

"Established 1882. Incorporated 1898.

"W. L. Wells Company,
Cotton Merchants.

"Cable address, 'Wells.'

"Yazoo City, Miss. Greenville, Miss.
"Edwards, Miss. Delhi, La.

"VICKSBURG, MISS., ——."

As shown by Record, page 48.

And on page 18, "It is admitted that all the letters that W. L. Wells Company wrote are written on this letter-head."

All the cotton sold was billed on the invoices of W. L. Wells Company, and the remittances were made to W. L. Wells Company. "*Statements of Account*" were rendered from time to time in the name of W. L. Wells Company.

These letter-heads, invoices, statements of account, were used during the entire period of the transactions between the W. L. Wells Company and defendant, embracing nearly three years, and the remittances were made during this period directly to the W. L. Wells Company.

The defendant bought cotton from the plaintiff throughout the next season, 1899–1900, and at the end of this season the Avon mills and the defendant owed the W. L. Wells Company $12,391.67, as shown by the statement rendered September 1, 1900, and the letter of W. L. Wells Company to John F. Love, treasurer (R., pp. 54 and 59), and testimony of John T. Wells (R., p. 19).

The business continued during a large part of the next season, 1900–1901, and at the time of the trial June 18, 1902, the Gastonia Manufacturing Company owed the W. L. Wells Company $35,397.99, exclusive of interest, and Avon mills owed it $26,750.36, exclusive of interest (R., p. 17).

As indicative of the real understanding of the parties during even the early part of the second season, 1899–1900, we append the following letters and telegrams:

"VICKSBURG, MISS., *November 8th*, 1899.

"*Mr. JOHN F. LOVE, Treas., Gastonia, N. C.*

"DEAR SIR: From your various letters of recent date we get the idea that you are inclined to buy your cotton this and next month. In this we have come to the conclusion that your decision is a wise one.

"From the best information we can gather about the crop, it is undoubtedly very much short of the past two, and everything looks to us like higher prices are bound to obtain later on. In short, we believe that the earlier you buy your cotton the cheaper you will get it, and we are inclined

to go right in and buy it. What say you? To do this, of course, we will have to look to you for some considerable help in the way of ready money, and while East, wouldn't it be a good idea to arrange for this?

"The banks in this section are unusually heavily loaded owing to the very rapid gathering of the cotton crop, and they are all loaded to the guards with interior cotton-buyers, and are not disposed to make any time loans. Of course, as far as our capacity goes, count on that, but it is a matter only of fifty to sixty thousand dollars, which at present prices of cotton won't go very far towards getting your supplies.

"Yours very truly, W. L. WELLS CO.

"W. L. W."

(R., p. 114.)

(*Telegram.*)

"GASTONIA, N. C., *Nov.* 10, '99.

"W. L. WELLS, *Vicksburg, Miss.*

"Letter received; buy cotton quick as possible; write occasionally.

"JOHN F. LOVE, *Treas.*"

(R., p. 114.)

"GASTONIA, N. C., *November 10th*, 1899.

"THE W. L. WELLS CO., *Vicksburg, Miss.*

"GENTLEMEN: Your long-looked-for letters to hand this morning, and in reply we immediately wired you to buy cotton, and let us hear from you occasionally, and send you the confirmation of the same.

"It has been our opinion for some days that we would see better prices; our goods are steadily advancing, and the demand is enormous.

"Buy our cotton as soon as possible, and we will make arrangements about money, and think we can get all we want at any time. Buy cotton, and send us invoices and letters telling us what you are doing and expect to do, and we will make our arrangements accordingly.

"We remain, in haste, awaiting your further favors,

"Yours very truly, JOHN F. LOVE, *Treasurer.*"

(R., p. 115.)

"VICKSBURG, MISS., *November 13th*, 1899.

"Mr. JOHN F. LOVE, *Treasurer, Gastonia, N. C.*

"DEAR SIR: We have yours of the 10th. It looks to-day like our delay in buying your cotton has been your good fortune. At all events it would appear that you have lost nothing, and likely otherwise. However, we don't think it a good idea to bet on the market going down much, nor at the same time would we advise rushing and buying too fast, but rather a happy medium between the two extremes.

"Now, don't let us annoy you about money matters, but you don't seem to get quite the idea we wish to convey. It is this: Up to date we have shipped you in round figures $65,000.00 of cotton, which is about our capacity, without borrowing from our banks, and this we don't care to do for reasons given in our last. Now, what we want you to do is to arrange for money so we will not have to carry you for exceeding, say, sixty to seventy thousand dollars.

"If you are to buy all your cotton in the next thirty to sixty days, it means an outlay of some $350,000.00 or say, practically $300,000 more than we are able to carry you for, hence we must ask that you either arrange to remit us as we buy, or let us draw at sight. We want to be very explicit about these matters, as it never hurts anybody to have a perfect understanding, but to the contrary in our opinion it is the only right way to do business.

"Yours very truly, W. L. WELLS CO.

"(W. L. W.)"

(R., pp. 115 and 116.)

The amount of cotton sold the defendant by the plaintiff, and the amount of remittances made by the defendant, as shown by Exhibit A and Exhibit B to the complaint of the plaintiff (R., pp. 5 and 6), and the correctness of the items are practically admitted by the defendant.

The first invoice for the season of 1899–1900 was dated October 19, 1899, embracing 100 bales of cotton, amounting to $3,884.32, and the last invoice of that season was dated June 22, 1900, embracing 64 bales of cotton, amounting to $3,283.18, which latter amount was paid on August 3, 1900.

The total amount shipped to the defendant for this season was 1,615 bales of cotton, evidenced by *nineteen* different invoices and aggregating $60,488.05 (R., pp. 5 and 6).

The first payment made on this account, as shown by Exhibit B (R., p. 6), dated November 17, 1899, was $9,212.72. The total remittances up to and including August 3, 1900, amounted to $54,586.67, and were evidenced by *eight* separate remittances.

Exhibit A (R., p. 5) shows that no cotton was shipped after January 1, 1901, and that the first cotton sold for the season of 1900–1901 was evidenced by invoice dated October 2, 1900, for 50 bales of cotton, amounting to $2,814.14, and from October 2 to December 18, inclusive, 974 bales of cotton were shipped, represented by *twelve* separate invoices amounting in the aggregate to $50,877.54.

The testimony of John T. Wells shows that no stock was paid for at the time of the subscription, nor any stock certificates issued or dividends declared, but, as stated by him, the capital stock was paid for out of the profits of the first year's business.

The defendant in its answer to complaint admits that the prices and weights of the cotton set forth in Exhibit A are correct, and that the "said bales of cotton were duly received by the defendant on the invoices from a *corporation* or partnership styled the *W. L. Wells Company*" (R., p. 8). It further admits it is willing to pay the sum of $7,285.46, and "denies that it owes *plaintiff* anything except said balance $7,285.46."

Before the case was tried each party stated its contention, as shown by the bill of exceptions (R., pp. 15 and 16), and the defendant's counsel stated

"that the defendant admitted that it had received from a firm or corporation called the *W. L. Wells Company* the cotton, as set forth in the complaint, and that the charges for the same were correct, as stated in the complaint, but that the defendant contended: first, that the plaintiff was not a

corporation, and, second, that there had been paid on this claim and the claim of W. L. Wells Company against the Avon Mills the sum of fifty thousand dollars ($50,000.00), and the defendant admitted owing the balance to the firm or corporation known as the W. L. Wells Company."

Here, therefore, are two distinct *admissions of record* that the defendant received the cotton from the plaintiff, *as a corporation*, and still owes a balance to the plaintiff, *as a corporation*. Defendant having refused to pay the balance claimed due by plaintiff, to wit, $35,397.99, as shown by said Exhibit A (R., p. 6), suit was instituted in the Circuit Court of the United States for the Western District of North Carolina, and judgment was recovered on June 20, 1902 (R., p. 11), by the said W. L. Wells Company against the defendant in the sum of $39,313.88.

An appeal was prosecuted to the Circuit Court of Appeals of the Fourth District, which reversed the case, upon the ground that the circuit court had no jurisdiction, and held the plaintiff could not sue in the Federal court for the recovery of this money, due and owing to it by the defendant.

ARGUMENT.

Pretermitting for the present any discussion of the rights of the plaintiff as a corporation *de jure*, which we insist the evidence establishes it to be, as will hereinafter be presented, we respectfully contend that the failure of the subscribers to pay their subscriptions to the capital stock of the plaintiff, before its commencement of business is immaterial and cannot defeat this action, and that under all the authorities, a number of them involving corporations where the subscription to capital stock had not been paid or fully paid, the plaintiff is at least:

1st. A corporation de facto.

2d. That its existence cannot be collaterally attacked.

3d. That defendant, after having contracted with it as a corporation and in the enjoyment of the fruits of such contract, cannot deny its corporate existence.

4th. That even as a corporation de facto the Federal Courts have jurisdiction, and have uniformly maintained jurisdiction of suits by and against corporations de facto.

I.

A.

The Plaintiff Is at Least a Corporation de Facto.

This court, after citing quite a number of cases, including The Baltimore & Potomac R. R. Co. *vs.* 5th Baptist Church, 137 U. S., 568–571, and also Taylor on Corporations, 4th Edition, section 146, adopts the rule maintained by those cases, and authoritatively and conclusively determines and

adjudicates the requisites to constitute a corporation *de facto* in the Federal Courts.

In Tulare Irrigation District *vs.* Shepard, 185 U. S., 113, upon which the circuit court relied, this court holds:

> "*From the authorities, some of which are above cited, it appears that the requisites to constitute a corporation de facto are three: (1) A charter, or general law, under which such a corporation as it purports to be might lawfully be organized; (2) an attempt to organize thereunder; (3) actual user of the corporation franchises.*" (Italics ours.)

These are *solely* and *wholly* the prerequisites, being only three, constituting a corporation *de facto* in the Federal Court, and no text-writer or any court but this can add anything thereto. This court found that the Tulare Irrigation District had complied with those *three* prerequisities, and it could not be successfully denied, we submit, that in this case the W. L. Wells Company (1) had procured a charter under the general laws of the State of Mississippi under which it might lawfully organize; (2) that it attempted to organize thereunder; that a meeting of the incorporators was held at which the charter was read and approved; that books of subscription were then and there opened, and $10,000 were then and there subscribed, $5,000 by one reputed to be worth from $150,000 to $300,000; that on the same day a meeting of the stockholders was held, and at said meeting three directors were elected, to wit, W. L. Wells, George Butterworth, and John T. Wells; that W. L. Wells was president, George Butterworth vice-president, and John T. Wells secretary and treasurer of plaintiff, and that (3) said plaintiff actually used its corporate franchises, buying and selling many hundred thousands of dollars' worth of cotton in its corporate name and capacity, thus doing a very large cotton business; that in two years it had accumulated net profits of fully $61,000, and that at the end of the first year's business, and before the debt sued on was contracted, the net profits amounted

to about $37,000, and that after deducting the $10,000 subscribed to the capital stock, and all sums withdrawn by each of the stockholders, there was still in the treasury over $22,000, and with said capital over $32,000, *and that at the end of the second year*, when the amount due by the defendant to the plaintiff *was comparatively small*, only $6,998.13, there was in the treasury of said corporation, after deducting all sums withdrawn by the stockholders and $10,000 subscribed to the capital stock, fully $27,000, and with said capital over $37,000.

The rule relating to corporations *de facto*, thus recently and explicitly stated in Tulare Irrigation District against Shepard, *supra*, we submit, should render further citation needless, but in view of the decision of the Appellate Court, which denies the right of plaintiff to recover the large amount of money due it by its debtor, we will refer in this connection to other leading cases, both in the Federal and the State courts, and in some of which, as we have already stated, it appeared that the *non-payment of the capital stock was a specific ground of attack*, as in this case.

In Whitney *vs.* Wyman, 101 U. S., 392, it appeared that the Grand Haven Fruit Basket Company had commenced business before its articles of association had been filed, as required by the statutes of Michigan, and the court below instructed the jury in substance (395):

"That if the corporation had acted as such, and exercised its franchises, then it was a corporation *de facto*, and that in such case any irregularity in its organization was immaterial."

This court said (page 397):

"The instruction given by the court to the jury with respect to acts *of user* by the corporation in proof of its existence was correct. If there was any error, it was in favor of the plaintiff."

In Close *vs.* Glenwood Cemetery, 107 U. S., 466, this court found "no stock was ever issued as provided in the charter" (p. 471), and said (p. 477):

"As no other person owned any part of the land or was entitled to a share in the corporation, the fact that no stock had been issued or divided is immaterial."

In Baltimore and Potomac Railroad Company against 5th Baptist Church, 137 U. S., 568, this court held:

"At the trial of an action of tort upon a plea of *nul tiel* corporation, evidence that the plaintiff, after filing a defective certificate of corporation under a general corporation law, acted for years as a corporation, and recovered a judgment as such in a similar action against the defendant without any objection made to its capacity to sue, is competent and *sufficient* to prove it a corporation *de facto*, and therefore entitled to maintain this action."

In Gartside Coal Company *vs.* Maxwell *et al.*, 22 Federal Rep., 197, Judge Brewer said:

"There was a corporation or what pretended to be a corporation, which purchased coal from the plaintiff, and the transaction extended through a series of years. The defendants, or the so-called corporation failed to pay—became insolvent; and this action is to charge those who were the stockholders in this supposed corporation as though they were partners; and the basis of the claim is that there was no corporation."

And he further said (page 198):

"Where a person deals with what he supposes is a corporation, what all parties think is a corporation, where he gives his credit to that supposed corporation, he cannot afterwards, when it turns out that it is not validly incorporated, turn around and say: 'Well, I dealt with this supposed corporation; I thought it was a corporation; I trusted it as a corporation; I sold goods to it as a corporation; but it seems that when it first attempted to become incorporated there was some defect or irregularity in its proceeding, so that it did

not become legally incorporated, therefore you who are stockholders will be held personally liable,'"

and he thereupon directed a judgment for the defendant.

He further said (page 197):

"It is very clear to my mind that this attempted incorporation was invalid, and that if it had ever been challenged by the officers of the State, in proper proceedings, its exercise of corporate powers would have been enjoined."

In Doyle *vs.* San Diego Land and Town Company, 46 Federal Rep., 709, "the point" was made "that the signing and acknowledgment of such articles (articles of incorporation) by an attorney-in-fact of another is of no validity."

The court said:

"Whether or not this is so, I think unnecessary to decide in this case, for the reason that the answer shows that the Kimball Bros. Water Company was a *de facto* corporation."

It is thus shown that the failure to comply with the State statute requiring that articles of incorporation should be signed and acknowledged by at least three persons does not prevent the corporation being regarded as at least *de facto*.

Where a consolidated railroad corporation of Ohio and Michigan from time of the consolidation exercised "the franchises of a consolidated corporation, without objection from the State, or the stockholders, who appeared and voted as its stockholders at its annual meetings, it is a *de facto* corporation though there was a failure to give the notice to the stockholders, or to file the certificate of consolidation as required by the Revised Statutes of Ohio, sec. 3380–3382."

Farmers' Loan & Trust Company *et al. vs.* Toledo, A. A. & N. M. R. R. Co., 67 Fed. Rep., 49.

In Andrews *et al. vs.* National Foundry and Pipe Works, Limited, and City of Oconto *vs.* Same, 77 Fed. Rep., 774, it was said:

"Finally it is suggested that, upon the theory of our opinion, the Oconto Water Company, having never issued valid stock, was without stockholders or legal organization, and had no power to give Andrews and Whitcomb a valid mortgage the existence *de facto* is unquestioned, and the existence *de jure* could be challenged only by public authority in the manner provided by law."

Judge Taft in Continental Trust Co. *et al. vs.* Toledo, St. Louis and K. C. R. Co. (9, 18, '97), 82 Fed. Rep., 642–650, says:

"It may be safely stated as the rule that when persons assume to act as a body, and are permitted by acquiescence of the public and the State to act, as if they were legally a particular kind of corporation, for the organization, existence, and continuance of which there is expressed recognition by general law, such body of persons is a corporation *de facto*, although the particular person thus exercising a franchise of being a corporation may have been ineligible and incapacitated by the law to do so."

In Louisville Trust Co. *vs.* Louisville, N. A. & C. Ry. Co. *et al.*, 84 Fed. Rep., page 539, the court said:

"The sole ground of objection to the complainant's case in the court below, as set forth in the petition of appellant, was the total invalidity of the various bonds and mortgages, because the defendant corporation, which is a consolidated company, was never regularly consolidated, and that under the law of Illinois, and the decision of the Supreme Court in the case of American Loan and Trust Company *v.* Minn. & N. W. R. Co., 157 Ills., 641, a railway corporation of Illinois could not be consolidated with a railway corporation of another State."

And the court held:

"Where from the time of consolidation it exercised the franchises of a consolidated corporation without objection from the State, or the stockholders who appeared and voted as its stockholders at its annual meeting, it is a *de facto* corporation."

In Venner *vs.* Farmer's Loan and Trust Co., 90 Fed. Rep., pages 348, 353, the court said

"that the stock subscribed in the new company was subscribed by persons who neither expected nor were able to pay their subscriptions, was a fraud upon the public as well as upon the creditors of that company; but it does not affect the fact of incorporation as to those who dealt with it as a corporation."

In Deitch *vs.* Staub, 115 Fed. Rep., 309–315, the court said:

"When the directors of the Knoxville Building & Loan Association applied for an amendment to the chancery court charter under which they had been acting as a building and loan incorporation, there was a valid law under which a valid building and loan incorporation might have been organized, and a law under which any building corporation organized theretofore under either a general or special law of the legislature, or under a chancery court decree, might obtain the powers conferred upon building incorporations by the act of 1875. This condition brings the case within even those definitions of a '*de facto* corporation' which seem to hold that there can be no *de facto* corporation, unless there was a valid law under which a *de jure* corporation might have been organized."

Reference will now be made to some of the leading cases in the State Courts:

ALABAMA.

"Corporation *de facto* exists when from irregularity or defect in the organization or constitution, or from some omission to comply with the conditions precedent, a corporation *de jure* is not created, but there has been a colorable compliance with the requirements of some law under which an association might be lawfully incorporated for the purposes and powers assumed, and a user of the rights claimed to be conferred by law, or in other words, where there is an organization with color of law and an exercise of corporate rights and franchises."

Snider Sons' Co. *vs.* Troy, 91 Ala., 224; 24 Am. St. Rep., p. 887.

It is to be noted that this was a case in which a creditor, *and not a debtor*, made an attack upon the corporate existence, and undertook to charge its stockholders as partners. The court said:

"A corporation *de facto* has an independent status recognized by the law as distinct from that of its members. A partnership is not the necessary legal consequence of an abortive attempt at incorporation."

And quoted the following from Fay *vs.* Noble, 7 Cush., 188:

"Surely, it cannot be, in the absence of all fraudulent intent, that such a legal result follows as to fasten on parties involuntarily, for such a cause, the enlarged liability of copartners, a liability neither contemplated nor assented to by them. The statement of the proposition carries with it a sufficient refutation."

California.

The appellate court cites Beach on Private Corporations, section 16, and that author quotes, as the authority for the doctrine announced in the text, Mockelumne Hill Mining Company *vs.* Woodbury, 14 Cal., 424; and it is therefore interesting to notice what the supreme court of California in a recent case (Martin *vs.* Deetz, 102 Cal., 55) has to say about corporations *de facto*:

"What is a corporation *de facto*? It exists where a number of persons have organized and acted as a corporation; have put on the habiliments of a corporation; have assumed the form and features of a corporation; have conducted their affairs, to some extent, at least, by the methods and through the offices, usually employed by corporations; and have assumed the appearance, at least, of the counterfeit presentment of a legal corporate body."

GEORGIA.

The brief of appellee in opposition to the granting of the prayer of the petition in this case cites Burns *et al. vs.* Beck *et al.*, supreme court of Georgia, — Ga., page —; 10 S. E. Rep., 121—a case which, so far from affording appellee any relief, directly supports the contention of appellant. The court in that case said:

"Burns and Parkins, both being officers of the corporation, and the only stockholders therein, held out the corporation to the world as duly organized; whereas, according to the allegation of the bill, all the stock had not been subscribed for nor had 10 per cent. thereof been paid. *The corporation, therefore, was one de facto only.*" (Italics ours.)

MICHIGAN.

In Swartwout *vs.* Michigan Air-line Railroad Co., 24 Mich., 389 (cited in Tulare Irrigation District *vs.* Shepard, *supra*), it was insisted, among other things, that the meeting of the stockholders for the election of directors and permanent organization was called before the requisite amount of stock had been subscribed; that some of the subscriptions were conditional, and that in some cases the 5 per cent. prescribed by law to be paid on subscribing was not paid. The court said:

"In the case of a company organized under a special charter, proof of the charter, and of user under it, is sufficient to establish a *prima facie* right in the plaintiff to sue, and this *prima facie* case an individual could not dispute in an action where the question comes up collaterally, and when the State as a party chiefly concerned cannot be heard by its counsel, and the ruling should be the same when an attempt has been made to organize a corporation under a general law, and the question is one of exact regularity and compliance with the law."

The Merchants' & Manufacturers' Bank *vs.* Stone *et al.*, 38 Mich., 779, is a striking case, and we quote at some length the facts as shown by the report. It appeared that Stone, Livingston, and Hughes, having previously made a contract with reference to a sale of land, cutting of timber, etc., on the 20th day of September, 1871, prepared and executed articles of association under the Michigan statutes. The name was the Charles Stone Timber Company, capital stock $100,000, divided into 4,000 shares of $25 each. The articles stated the amount actually paid in was $10,000; that Livingston and Hughes each held 1,800 shares and Stone 400 shares, and that the affairs were to be managed by three directors. The articles were filed with the Secretary of the State, and also in the office of the clerk of Wayne county. Notice was published for first meeting of stockholders. Only Livingston and Hughes were present, and they agreed they would call Stone president, Hughes vice-president, and Livingston secretary and treasurer. A rough memorandum in pencil was made of such agreement, but no other or further record. No other formal or further meeting of stockholders was ever held, nor did the board of directors have a formal meeting. When they met they talked over matters, but kept no record of any proceedings. Books were kept by Livingston in Detroit; they show no stock account and no capital account, but did show a credit to Stone of $50,000, the contract price of the land, and other things sold under the contract of September 16, and also $10,000 advances.

"Nothing was ever paid in by any of the parties to the capital stock of the concern, unless what was said about putting in the Chains and Boom Co. stock can be so considered."

In this connection the language of Livingston was quoted, who said:

"The intention was that these Chains and Boom Company's stock to the amount of $10,000 at a fair valuation—

that they should constitute the first $10,000 of the capital stock paid in."

"Q. What was done then about actually putting it in?

"A. Nothing done that I particularly remember; it may be, but I am not certain.

"Mr. Stone gave Mr. Hughes an order on the secretary of the Au Sable Boom Company to transfer the stock to the Charles Stone Timber Company."

And the judge said:

"Nothing further was ever done under these articles, except that work was at once commenced by Livingston and Hughes under their contract with Stone, etc."

The note sued on was a renewal note discounted to enable the business to be carried on.

The court said:

"Certainly the evidence the bank introduced in regard to the operations of the company, the attitude it maintained, and the character in which the two concerns dealt together showed that it was a corporation *de facto*, and so acknowledged by the bank."

MINNESOTA.

"Color of an apparent organization under some charter or enabling act, does not mean that there shall have been a full compliance with what the law requires to be done, nor a substantial compliance. A substantial compliance will make a corporation *de jure*. But there must be an apparent attempt to perfect an organization under the law. There being such apparent attempt to perfect an organization, the failure as to some substantial requirement will prevent the body from being a corporation *de jure;* but if there be user pursuant to such attempted organization, it will not prevent it being a corporation *de facto*.

Finnegan *vs.* Noerenberg, 52 Minn., p. 239; 38 American State Reports, p. 552.

North Carolina.

In the case of Attorney General *vs.* Simonton, 78 N. C., p. 57, the court holds that if a number of persons got together and assumed the functions of a bank under the charter granted by the legislature they were bound by their acts, although no books of subscription had ever been opened, no *bona fide* capital had ever been paid in, and no organization ever effected.

New Jersey.

In Hackensack Water Company *et al. vs.* Minna De Kay *et al.*, 36 N. J. Eq., p. 548, the court said:

"The statute forbids the election of any person as a director who was not at the time *bona fide* holder of some of the stock of the corporation. The company was organized August 1st, 1873, and directors were elected August 23rd—1873—at that time very little of the stock had been subscribed for and paid in. Indeed the paid-up subscriptions to the stock were never such as to authorize organization under the act of incorporation, and although 4 of the 5 directors elected had subscribed for stock none of them had paid his subscription."

The court further said:

"It is *indisputable that the organization was illegal, and that the directors had not the legal qualifications for their offices: but it is also undeniable there was an organization in form—and that the company became a corporation de facto.* (Italics ours.)

New York.

In Eaton *et al. vs.* Aspinwall, 19 N. Y., p. 121, an attempt was made to organize the Mexican Ocean Mail and Inland Company under a statute of New York, the second section of which provides that, when 10 per cent. of the capital is *paid* in, "the persons who shall have signed and acknowl-

edged the same (the certificate of incorporation) and their successors," etc., "shall be a body politic and corporate in fact and in name;" "the company elected its officers, hired an office, and engaged in the actual transaction of business as a corporation," but the 10 per cent. of the capital stock required by the act was not paid in. The court held it was a corporation *de facto*, and further "that this corporation though not a valid corporation in the point of law may carry on its enterprises, have its day in court, and divide its revenue among the holders of the shares of its capital until the State shall interpose and ask that it be dissolved."

TEXAS.

In American Salt Company *vs.* Heidenheimer, 80 Texas, 344, 26 Am. St. Rep., p. 743, it was shown that there was a distinct violation of the law, because the statute required at least two of the subscribers to the charter must be citizens of the State, and the fact was established that none of the subscribers was a citizen, yet the court held:

"*A corporation de facto is a corporation organized and operated under color of the law, but not legally constituted. The statute of Texas requires that at least two of the subscribers to the charter of an intended corporation must be citizens of the State. Where, therefore, articles of incorporation filed in the office of the secretary of state are signed by persons none of whom are citizens of the State, the corporation is not legally constituted, but until the pretended charter is vacated it is a corporation de facto.*" (Italics ours.)

The court cites:

Merchants', etc., Bank *vs.* Stone, 38 Mich., 779, *supra.*
Fay *vs.* Noble, 7 Cush., 188.
Gartside Coal Co. *vs.* Maxwell, 22 Fed. Rep., 197, *supra.*

Clark & Marshall, in their work on Private Corporations, vol. I, pages 257 and 259, say:

"There may be a corporation *de facto*, the existence of which cannot be attacked collaterally—though the capital stock or

a certain per cent. thereof was not subscribed or paid, as required by the statute."

Citing—

Stokes *vs.* Findlay, 4 McCrary, 205; Fed. Cases, No. 13478.
Duke *vs.* Cahawba Nav. Co., 10 Ala., 82.
Bibb *vs.* Hall, 101 Ala., 79.
Lehman *vs.* Warner, 61 Ala., 455.
Canfield *vs.* Gregory, 66 Conn., 9, 17.
Union Water Co. *vs* Kean, 52 N. J. Eq., 111.

It seems to us that the erroneous conclusion reached in this case is also based upon a misapprehension of what constitutes the "capital stock" of a corporation, and that undue importance is given to a mere certificate of stock. It is not necessary to issue certificates of stock in order to make the owners of stock stockholders, nor does the validity of the corporation depend upon the mere issue of certificates of stock.

This doctrine, we submit, cannot be questioned. Mr. Cook, in his treatise on the Law of Corporations, 5th ed. (1903), vol. I, sec. 13, says:

"A certificate of stock is from one point of view a mere muniment of title, like a title deed. It is not the stock itself, but evidence of the ownership of stock; it operates to transfer nothing from the corporation to the stockholder, but merely affords to the latter evidences of his rights."

"*It should be clearly understood that the certificate is not the stock but merely written evidence of the ownership of stock.*"

"The certificate, therefore, has value in itself as evidence, but apart from the shares which it represents it is utterly worthless. *A certificate of stock is not necessary to the complete ownership of the stock, nor is payment of the subscription necessary thereto.*"

"*It is not essential to the existence of a corporation that certificates of stock be issued. Without a certificate the stockholder has a complete power to transfer his stock, to receive dividends, and to*

vote, and he is individually liable as a stockholder." (Italics ours.)

"Stock may be transferred without a transfer of a certificate."

In the recent case of Pitsch *vs.* Krause *et al.* (supreme court of Wisconsin, January 13, 1903), 93 N. W. Rep., 9, the supreme court of Wisconsin quotes with approval some of the language of Mr. Cook above set forth.

The doctrine so inflexibly maintained in all of the above cases necessarily, in our opinion, overthrows *any contention* that the W. L. Wells Company *was not at least a corporation de facto.*

B.

The Corporate Existence of Plaintiff Cannot Be Collaterally Attacked.

The doctrine that the existence of a corporation *de facto* cannot be questioned in a collateral proceeding is maintained by this court, and from the rendition of the decision in Frost *et al. vs.* Frostberg Coal Co., 24 Howard, 217, to the present time, it has never been denied.

In that case it was insisted "that the stock of this company at the *time* of its *organization*, was held in violation" of the fifteenth section of the general act of Maryland, which provides "that when over four-fifths of the capital stock of the company to which the act applies shall become concentrated, by purchase or otherwise, in the hands of less than five persons, etc., all the corporate powers and privileges granted shall cease and determine."

This court said:

"But whether it (this four-fifths provision) does (apply), or not, *it is unimportant to determine; for conceding that it does, a private party cannot take advantage of the forfeiture, that is a question for the sovereign power, which may waive it, or enforce it, at its pleasure.*" (Italics ours.)

In The County of Macon *vs.* Shores, 97 U. S., 272 and 277, this court said:

"The objection that the corporation was not organized within the time limited by the charter is not availing. It is in fact a plea of *nul tiel corporation*. In Kayser *vs.* Trustees of Bremen (16 Mo., 88) the supreme court of the State said:

"'It cannot be shown in defense to a suit of a corporation, that the charter was obtained by fraud; neither can it be shown that the charter has been forfeited by a misuser or non-user. Advantage can only be taken of such forfeiture by process on behalf of the State instituted directly against the corporation for the purpose of avoiding its charter; and individuals cannot avail themselves of it in collateral suits until it be judicially declared.'"

In Whitney *vs.* Wyman, 101 U. S., 392–397, this court said:

"The restriction imposed by the statute is a simple inhibition. It did not declare what was done should be void, nor was any penalty prescribed. No one but the State could object. The contract is valid as to the plaintiff, and he has no right to raise the question as to its invalidity."

In New Orleans Debenture Redemption Company *vs.* Louisiana, 180 U. S., 320, on page 328 the court found the company to be "a *de facto* corporation, and those who contracted with it as such cannot set up as a defense, when sued by it upon those contracts that it was not a corporation or that its organization was a nullity. None but the State could call its existence into question."

Citing—

Chubb *vs.* Upton, 95 U. S., 665, and
Baltimore & Potomac R. R. Co. *vs.* 5th Baptist Church, 137 U. S., 571.

In Tulare Irrigation District *vs.* Shepard, 185 U. S., 1–14, this court held:

"Being a *de facto* corporation, the general rule is that none

but the State can call its existence into question. The courts of California agree that such is the rule.

"People *v.* Montecito Irrigation Co., 97 Cal., 276.
"Quint *v.* Hoffman, 103 Cal., 506.
"Cooley on Constitutional Limitations, p. 309, 6th ed."

"Where a reputed public corporation is acting under the forms of law unchallenged by the State, the validity of its organization cannot be brought into question by private parties. Neither the *nature* nor the *extent* of an *illegality* in its organization can affect its existence if it be acting under color of law, and the State makes no complaint."

Miller *vs.* Perris Irrigation District *et al.*, 85 Fed., 693.

The court, after quoting (page 698) from Dillon on Municipal Corporations, 4th ed., sec. 43*a*:

"Where a municipal corporation is acting under a color of law, and its existence is not questioned by the State, it cannot be collaterally drawn into question by private parties,"

then said:

"As to private corporations, the rule above stated has often been applied by the supreme court of California."

"Where the statute of a State authorizes the consolidation of railroad companies of the State with those of other States under certain conditions and circumstances, a consolidation of such companies creates a *de facto* corporation, even though the constituent companies do not possess the qualifications required by the statute to render the consolidated company a corporation *de jure*, and its corporate existence could only be questioned on that ground by the State."

Toledo, St. L., K. C. R. Co. *et al. vs.* Continental Trust Co. *et al.*, 95 Fed. Rep., 497.

"The legality of the organization of a corporation cannot be attacked collaterally in private suit against it, but only in a direct action by the State."

Armour *vs.* E. Bement's Sons, 123 Fed. Rep., 56.

This, as will be noticed, is quite a recent case. On page 60 the court said:

"We do not enter upon the consideration of questions raised in regard to the regularity of the organization of the new company, as affected by the suggestion that *no part of the capital stock was paid in cash*" (italics ours), a question in which plaintiff apparently has no concern, or whether in fact there was any fraud in the acquisition of the charter of the old company by the new, first because the validity of the incorporation cannot be tested in this collateral and private suit, but only in a direct proceeding by the State" (citing Morawetz on Corporations, sec. 2022).

This is also the law of the State of Mississippi, a State under whose statutes the plaintiff was created, where the contract entered into between plaintiff and defendant was to be performed, so far as payment is concerned, as the cotton was sold and shipped from that State and remittances were made to it in that State.

In Fargason *et al. vs.* Oxford Mercantile Co. *et al.*, decided by the supreme court at its March term, 1900 (78 Miss., page 65), it was charged that by the terms of the charter business could be begun when 40 per cent. of its capital stock was paid, but that the parties began business before so much had been paid and that it had never been paid; that a number of the pretended stockholders had never paid anything, their stock having been issued to them in payment of debts due them from N. H. Bryant, the principal instigator of the scheme, or as gifts from him: that only $2,500 was paid in for stock before the concern began business; that the pretended corporation, really a partnership, is insolvent, and has been so from the beginning of its business.

The court said (page 72):

"Section 5 of the charter of the company authorizes it to commence business 'when as much as 40 % of the authorized capital has been actually paid in.' It is shown that goods of the value of 50 % of it were put in. This is enough, and in

any case, this was a matter for the State, and cannot affect the rights of creditors in good faith."

The State of North Carolina, where this defendant was organized, upholds the same principle.

Elizabeth City Academy *vs.* Lindsey, 28 N. C. (6 Ired.), 476.

Navigation Co. *vs.* Neal, 10 N. C. (3 Hawks.), 520.

Turnpike *vs.* McCarson, 18 N. C. (I. D. & B.), 306.

In the early case of Rice *vs.* The Rock Island & Alton R. R. Co., 21 Ill., 93 (1884), it was insisted for the defense that $500,000 of the stock had not been subscribed, and that the stockholders, previous to the organization, created spurious and false subscriptions to the amount of the deficiency in order to effect an organization. The court, however, said:

"The party ought not to be permitted in this collateral way to question the regularity of the organization of the company. If it has assumed to exercise corporate functions before it had a right by law to do so, if it has usurped franchises not granted by the statute, that should be more properly inquired into by a direct proceeding to seize the franchises to the people, and dissolve the corporation."

This case was approved in the subsequent case of People *ex rel.* Brewster *et al. vs.* Board of Trustees of Schools, 111 Ill., 171.

The author of the American and English Enc. of Law, vol. 7, title "Corporations," 2d ed., 655, says:

DE FACTO CORPORATIONS.

"It is true as a general rule that a corporation must have a full and complete organization in accordance with the law to which it owes its origin; but when an association of persons *is found in the exercise and use of corporate franchises, under color of legal organization, in pursuance of some charter or some general law, their existence as a corporation cannot be*

inquired into collaterally." (Italics ours.) "In a direct proceeding by the Government, they may be ousted. The corporation exists *de facto*, and is subject to all the liabilities, duties and responsibilities of a corporation *de jure*."

This principle is also recognized and maintained in—

Jones *vs.* Habersham, 107 U. S., 174.
Fritts *vs.* Palmer, 132 U. S., 282, 291, 292, 293.
Moxie Food Co. *vs.* Baumbach, 32 Fed. Rep., 205.
American Cable Co., etc., *vs.* City of New York, 68 Fed. Rep., 227.
Columbia Wire Co. *vs.* Freeman Wire Co. *et al.*, 71 Fed. Rep., 302.
Young, etc., V. Lock Co. *vs.* Young, etc., Co., 72 Fed. Rep., 62.
Andrews *vs.* Pipe and Foundry Co., 77 Fed. Rep., 774.
Ryland *vs.* Hallinger, 117 Fed. Rep., 216.

The case of Smith *vs.* Sheeley, 12 Wallace, 358, has been frequently cited both by the Federal and State courts, and applies the doctrine with great clearness and force, assuming it to be settled even in a case where a bank did business under a territorial charter before said charter was approved by Congress, as the law required.

Mr. Justice Davis, speaking for the court, said (page 361):

"It is not denied that the bank was duly organized in pursuance of the provisions of an act of the legislature of the Territory of Nebraska, but it is said it had no right to transact business until the charter creating it was approved by Congress. *This is so, and it cannot legally exercise its powers until this approval was obtained; but this defect in its constitution cannot be taken advantage of collaterally. No proposition is more thoroughly settled than this, and it is not necessary to refer to authorities to support it.*" (Italics ours.)

In view of these cases, and others that could be cited, how is it possible to maintain the proposition that a defendant,

or a court, can destroy a corporation in a collateral proceeding, when it must be *admitted that this can* only be done, if at all, by the sovereign State in a direct attack?

C.

Defendant, having contracted with plaintiff as a corporation, and is now enjoying the fruits of such contract, is estopped to deny its corporate existence.

In Casey *vs.* Galli, 94 U. S., 673 and 678, the declaration averred that "on or before the 3d of June, 1864, the Bank of New Orleans was a banking corporation, organized under the laws of the State of Louisiana, and as such carried on the business of banking until about the 1st day of July, 1871," when by virtue of the act of Congress approved June 3, 1864, it "became a national banking association under said act," under the name and style of the New Orleans National Banking Association, and carried on the business of banking until the 4th day of October, 1873, when it failed. At the date of the failure of the association the defendant was the owner of fifty shares of capital stock of the par value of $30 each, and it was claimed therefore he was liable to pay the sum of $1,500.

Among the two pleas in abatement relied upon, one averred, in substance, that there was no such corporation as the New Orleans Banking Association in existence, "because the Bank of New Orleans had no power by its charter nor authority otherwise from the State of Louisiana to change its organization to that of a national banking association," and the other that there was no such corporation in existence, because the owners of two-thirds of the capital stock of the Bank of New Orleans did not authorize the bank to be converted into a national banking association, nor to ac-

cept an organization certificate as such banking association. This court after consideration of these pleas said (p. 680):

"There is another ground upon which both pleas must be held bad. Where a shareholder of a corporation is called upon to respond to a liability as such, and where a party has contracted with a corporation, *and is sued upon the contract, neither is permitted to deny the existence of the legal validity of such corporation. To hold otherwise would be contrary to the plainest principles of reason and of good faith and involve a mockery of justice. Parties must take the consequence of the position they assume.*" (Italics ours.)

Citing—

Eaton *et al. vs.* Aspinwall, 19 N. Y., 119, *supra.*

Tar River Navigation Co. *vs.* Neal, 3 Hawks, N. C., 520.

And cited, among others, Missouri, Connecticut, Massachusetts, Alabama, Indiana, and Kentucky cases.

In Chubb *vs.* Upton, 95 U. S., 665–667, the court said:

"*It is settled by the decisions of the courts of the United States, and by the decisions of many of the State courts that one who contracts with an acting corporation, cannot defend himself against a claim on such contract, in a suit by the corporation, by alleging irregularity of its organization. This was settled more than half a century since in the courts of the State of New York, and has recently been affirmed in this court.*" (Italics ours.)

In the trial of this case the defendant offered to prove, "that he was induced to purchase the stock by false representations, that he would only be compelled to pay 20 % of the amounts subscribed; and that the holders of the stock in the original company never increased their stock or authorized any one to increase it, and never sold or transferred it to the new company." This evidence was excluded.

In Whitney *vs.* Wyman, 101 U. S., 392–396 and 397, it was insisted "the corporation at the date of these letters was

forbidden to do any business, not having then filed its articles of association as required by the statute."

The court said (page 397):

"The corporation having assumed by entering into the contract with the plaintiff to have the requisite power, both parties are estopped to deny it—the contract is valid as to the plaintiff, and he has no right to raise the question of its invalidity."

In Andes *vs.* Ely, 158 U. S., 312–322, this court said:

"It is objected that there was no legal incorporation of the Delhi & Middletown R. R. Co. The objection is that the statute (of New York) requires that there shall be subscribed at least $1,000 of stock for every mile of railroad proposed to be laid, and that, as appears from the articles, certain subscriptions were made on condition that the road was located through Lumberville, and others, provided the road went to Shavertown. These subscriptions being conditional it is claimed amount to nothing, and as the unconditional subscriptions are less than $1,000.00 per mile of the proposed road, it is insisted that the attempted corporation was a failure.

"*We deem it unnecessary to consider this question, for it is familiar law that one who contracts with a corporation as such, cannot afterwards avoid the obligations assumed by such contract, on the ground that the supposed corporation was not one de jure.*" (Italics ours.)

In New Orleans Debenture Company *vs.* Louisiana, 180 U. S., 320–328, it was held that—

"Those who contracted with it as such (corporation *de facto*) could not set up as a defense when sued by it upon those contracts, that it was not a corporation, or that its organization was a nullity."

And, finally, in the late case of Tulare Irrigation District *vs.* Shepard, 185 U. S., page 1, to which we have already referred, this court again gave its approval to the doctrine and in terms too clear to be affected by construction. In that

case the district had "refused to pay the bonds and denied its liability on them upon the ground that it was never legally organized as a corporation, and hence had no legal right to issue any bonds."

The court, after showing that the money arising from the sale of the bonds was used by the defendant corporation, as in this case (for it is undeniable that the defendant bought cotton from plaintiff and still owes for the same), quotes from Douglas County Commissioners *vs.* Bolles, 94 U. S., 104, 110: Common honesty demands that a debt thus incurred should be paid, and said, "That sentiment has lost no force by the lapse of time."

This rule has been undeviatingly maintained by United States circuit courts and the Federal courts of appeals:

"A person who deals with a corporation, or gives to an assumed corporation a note, cannot question the corporate existence of that party with whom he has dealt or to whom he gave his note."

Gartside Coal Co. *vs.* Maxwell *et al.*, 22 Fed. Rep., 197, *supra.*

"The law is well settled that a person who contracts with an apparent corporation as such is estopped when sued on such contract to say that the plaintiff had no corporate existence or power to make such contract."

Oregonian Railway Company, Limited, *vs.* Oregon Railway and Navigation Co. (Ore.), 23 Fed. Rep., 232, *ibid.* Judge Deady said on page 238:

"But where the law authorizes the formation and existence of the alleged corporation, with power to make the contract in question, then a party thereto ought not and cannot be heard in an action thereon by such corporation, to deny its due formation or legal existence, with the power to make said contract."

"Where a corporation fails to comply with the statutory requirements as to the payment of capital stock making annual reports, etc. that fact will not invalidate a loan made

in good faith, in the usual course of business, to such corporation."

Lippincott *et al. vs.* Shaw Carriage Company *et al.*, 25 Fed. Rep., 577.

In that case it was contended that the officers of the corporation and directors had totally disregarded the requirements of the statute:

"(1.) They failed to fix the amount of the capital stock as required by section 3857 of the Revised Statutes (of Indiana).

"(2.) The capital stock was not paid in within 18 months after the incorporation."

"Creditors of a *de facto* corporation, who dealt with it as a corporation, are estopped to deny its corporate existence for the purpose of defeating a mortgage which it executed in such capacity."

"It is not debatable but that a *de facto* corporation is estopped to deny its existence as a corporation for the purpose of defeating liability upon the contracts incurred by it while pretending to be acting as a corporation. The same estoppel extends to the stockholders of such a *de facto* organization, and to other persons who have dealt with it as such."

Toledo, St. Louis & K. C. R. Co. *et al. vs.* Continental Trust Co. *et al.*, 95 Fed. Rep., 497 and 507, *supra.*

"One who deals with a corporation as a building and loan association, becoming a stockholder and a borrower from it, is estopped to deny its character as such an association to avoid liability on his contract."

Manship *et al. vs.* New South Building & Loan Asso. *et al.*, Cir. Ct. Sou. Dist. of Miss. (7, 27, 1901), 110 Fed. Rep., 845.

"It is settled by the decisions of the courts of the United States and by the decisions of many of the State courts that one who contracts with an acting corporation cannot defend himself against a claim on such contract, in a suit by the corporation, by alleging irregularity of its organization."

American Alkali Co. *vs.* Campbell (Penn.), 113 Fed. Rep., 398, 405.

"A member of a building and loan association who obtains a loan from it, and executes his note and mortgage therefor, waives the right to deny the power of the association to make such loan, or to carry on the business of such association, and is estopped to set up an irregularity in its organization in defense to an action to enforce the contract."

Deitch *et al. vs.* Staub, 115 Fed. Rep., 309.

The contract sued on in this case is, as we contend, a Mississippi contract, and the Supreme Court of that State is in full accord with the Federal courts.

In the very early case of Smith *et al. vs.* Mississippi and Alabama Railroad Company (1846), 6 Smedes and Marshall, 179, it appears that the railroad company sued Smith and others on a note made by the defendants for $10,926.28, dated March 29, 1838, and payable to the plaintiffs ninety days after date. The defendants offered to prove—

"That at the ostensible commencement of the bank, and before the origin of the note sued on, but $30,000 in specie of the $100,000 required by the charter had been paid in, in specie, the residue being paid in fraudulent certificates of deposit in and the paper of other banks, and that soon after its organization the specie paid in was no longer on hand."

This proof was rejected.

The court held:

"In an action of assumpsit by a bank upon a promissory note payable to itself, it is not competent for the court, at the instance of the defendant, to inquire into the organization of the bank, or as to fraud in the taking of its stock."

In the later case of Johnston *et al. vs.* Gumbel *et al.* (November 18, 1895), 19 Sou. Rep., 100, the supreme court of Mississippi applied the same doctrine even to *creditors:*

"Creditors of a corporation having dealt with it in its corporate capacity cannot attack an assignment by it on account of irregularity in its formation."

A late California case, Weil *et al. vs.* Crittenden, July 2, 1903, 73 Pac. Rep., 238, in view of the citations by the Court of Appeals from the text of Mr. Bishop is interesting and instructive. The court said:

"We need not consider the matter of the form of denial that plaintiff was a corporation organized and existing under the laws of this State, for, in this action to recover the price of goods purchased and received by defendant from plaintiff, the former is not in a position to question the corporate capacity of the latter."

We therefore submit that the proposition that this defendant, indebted to this plaintiff for over $39,000 for cotton purchased from it in its corporate name and as a corporation, is *not estopped* from denying its corporate character, *is absolutely unsupported by any case which can be regarded as an authority.*

D.

Having thus established, as we contend, that the plaintiff is *at least a corporation de facto, that its corporate existence cannot be collaterally attacked, and that the defendant is estopped from assailing its corporate existence,* it necessarily follows that—

THE CIRCUIT COURT HAD JURISDICTION.

It seems to us that after the Federal courts of the United States have unhesitatingly taken jurisdiction over many cases involving the rights of *de facto* corporations to sue and to be sued, have rigorously and inflexibly protected their corporate existence time and time again from collateral attacks, and have maintained that such existence can only be challenged by the State in direct proceeding, and having announced, in language so plain "that he who runs may read," that a debtor of such a corporation cannot deny its

right to sue, and that common honesty requires the payment of such debt, and having invariably enforced contracts of corporations *de facto*, and in doing so necessarily assumed jurisdiction over the suits involving the integrity or validity of such contracts, a defense of the want of jurisdiction of such courts cannot now be the subject of serious argument.

If the Federal courts did not have jurisdiction in all these cases, why should they deliberately consider whether the corporation suing or being sued was *de facto* or not, declare that only the State can raise the question of the validity of the corporate existence by direct proceeding, and that the debtor was estopped from raising the question of the legality of the organization by way of defense, and then proceed to render judgment?

Can it now be gravely maintained that all of the many judgments and decrees heretofore rendered in the Federal courts in cases of this sort were, for all legal purposes, absolutely void, and that with the point squarely presented, either in the pleadings or in the argument, that the corporation whose rights were being determined *were* merely a corporation *de facto*, the courts deliberately usurped jurisdiction? But even if the courts had not been called upon to determine what constitutes a corporation *de facto*, its inviolability to collateral attack, and the right of its debtors to attack its corporate existence, yet, if it had been an undeviating practice of the Federal courts to hear and determine cases where it clearly appears the rights of a *de facto* corporation and of its debtors and creditors were involved, although the fact that it was a *de facto* corporation was not specifically mentioned in the pleadings, arguments or opinions, we respectfully submit that such *a practice so long in force would now preclude* a defense of a want of jurisdiction. But we maintain that the *question* of jurisdiction was not only impliedly and passively decided by the courts when it assumed jurisdiction over the merits of these cases, but has been expressly considered and sustained.

The Supreme Court of the United States in Frost *vs.* Frostberg Coal Co., 24 Howard, 278 *supra*, decided 16th of December, 1860, said:

"*The courts are bound to regard it (a corporation irregularly organized and therefore a corporation de facto) as a corporation, so far as third persons are concerned, until it is dissolved by a judicial proceeding on behalf of the Government that created it.*" (Italics ours.)

Thus the Supreme Court said, The *courts*, not the *State courts*, but necessarily the *Federal courts*, are *bound to* regard such corporations as corporations, and although over two score years have elapsed since the date of that decision, there is nothing in the Federal Reports, which we have been able to discover, that limits or modifies that doctrine.

In Smith *vs.* Sheeley, 12 Wallace, 358, *supra*, it is said:

"*Conceding the bank to be guilty of usurpation, it was still a body corporate de facto, exercising at least one of the franchises which the legislature attempted to confer upon it.*" (Italics ours.)

And also said that this bank "could not legally *exercise* its powers until this approval was obtained," but authoritatively declared "this defect in its constitution cannot be taken advantage of collaterally," and the necessary effect of the decision is *to directly maintain* the jurisdiction of the Federal court and to deny to the *court* and the litigant the right to inquire into the existence of a corporation *de facto*.

The point was directly presented also in Blackburn *vs.* Selma, etc., R. R. Co., 2d Flipp, 525 (Fed. Cases, No. 1467). There defendant sought to evade the jurisdiction of the Federal court upon the ground that it was not regularly organized as a corporation.

The court said:

"It is claimed that the question here is one of jurisdiction, and therefore this doctrine of estoppel does not apply, however it may be in a case where the defense is *non est factum* or some other plea to the merits. * * * We cannot see

why this estoppel is not as conclusive to support the jurisdiction as to support the contract. If a body of citizens shall assume to act as a Tennessee corporation, keep its headquarters and principal offices here as this did, execute bonds and mortgages, including property lying in Tennessee, and reciting and showing its Tennessee charter and the legislature as a part of its authority to do these acts, we do not see why its estoppel by them to deny its Tennessee citizenship as well when the Tennessee jurisdiction depends upon it as when the validity of its contract is called in question. * * * We say, then, that when parties act as a corporation in Tennessee, and claim to be a Tennessee corporation and deal as such, they are estopped to deny that the corporation is a Tennessee corporation when sued in the Federal courts of that State; and they can no more aver their non-user or non-acceptance of the charter under which they have assumed to act against the jurisdiction of the court in which the corporation is sued then they can aver the fact against the contract itself."

We also maintain that the doctrine that the Federal courts have jurisdiction over *de facto* corporations has practically received legislative recognition. Since the rendition of the decision in Frost *vs.* Frostberg Coal Co., *supra*, and Smith *vs.* Sheely, *supra*, the act of September 24, 1789, which prescribes the jurisdiction of the circuit courts of the United States, has been amended three different times, to wit, by act of March 3, 1875, c. 137; in March, 1887, c. 373; act of August 13, 1888, c. 866; and as these later acts were passed long after the Federal courts had assumed jurisdiction of corporations *de facto*, and as Congress did not expressly deny this right of the Federal court, it must be assumed, we submit, that by the enactment of these statutes Congress accepted the interpretation of the previous statute by the Supreme Court, that under said statute jurisdiction over corporations *de facto* existed, for the subsequent substantial re-enactment of the statute without rejecting such interpretation, under a familiar rule, is an adoption of that interpretation.

Dollar Savings Bank *vs.* United States, 19 Wall., 237.
Bardes *vs.* Howarden Bank, 178 U. S., 530.

The act of March 3, 1875, as amended in 1887 and 1888, gives the circuit court of the United States original cognizance, concurrent with the courts of the several States, of all suits of a civil nature at common law or in equity, where the amount in dispute exceeds, exclusive of interest and costs, the sum or value of $2,000, in which there shall be controversies between citizens of different States. It will thus be seen that the jurisdiction of the circuit courts of the United States is *concurrent* with the courts of the several States, and, of course, the State courts of North Carolina and Mississippi have jurisdiction of this controversy.

The Federal courts have given the word "citizen," as applied to corporations or *quasi* corporations, a liberal interpretation.

Mr. Carter, in his work on Jurisdiction of Federal Courts, on page 56, says:

"A majority of cases have held that what are known as joint stock companies may be treated as citizens of the State under whose laws they are organized for all purposes."

See also—

Fargo *vs.* Louisville, etc., R. R. Co., 6 Fed. Rep., 787.
B. & O. R. R. Co. *vs.* Express Co., 22 Fed. P., 404.

In Andrews Co. *vs.* Youngstone Co., 86 Fed. Rep., 585, a limited partnership, and in The Board of Chicot City *vs.* Crittenden, 94 Fed., 613, a levee board, were in each instance allowed to maintain a suit as a corporation.

In Louisville, etc., R. R. Co. *vs.* Letson, 2 Howard, 497, it was held:

"When a corporation exercises its powers in the State in which it was chartered, that is its residence, and such an averment is sufficient to give the circuit courts jurisdiction."

Again, in Kansas, etc., R. R. *vs.* Santa Fe R. R., 112 U. S., 414, this court said:

"In all cases where a Federal court can take jurisdiction of controversies between citizens, it will take jurisdiction of

controversies between corporations, and treat them as citizens of the State under whose laws they were created or continued to exist."

It may be further stated that when a corporation *de facto* exists, so far as *the court and third persons are concerned*, it possesses the powers of a *de jure* corporation.

We again refer to a California case because of the citation of the Court of Appeals of the text of Beach on Corporations, which, as we have stated, is based upon a decision of the supreme court of California.

In People *vs.* La Rue, 67 Cal., 526–530, the supreme court said:

"A corporation *de facto* may legally do and perform every act and thing which the same entity could do and perform were it a *de jure* corporation."

"As to all the world except the paramount authority under which it receives its charter, it occupies the same position as though in all respects valid, and even as against the State, except in direct proceedings to arrest its usurpation of power, its acts are to be treated as efficacious."

The doctrine is also distinctly stated in Snider's Sons' Co. *vs.* Troy, 91 Ala., 224; 24 Am. St. Rep., 887:

"Corporations may exist either *de jure* or *de facto*. If of the latter class, they are under the protection of the same law and governed by the same legal principles as those of the former, so long as the State acquiesces in their existence and exercise of corporate functions. A private citizen, whose rights are not invaded, who has no cause of complaint, has no right to inquire collaterally into the legality of its existence. This can only be done in a direct proceeding on the part of the State, from whom is derived the right to exist as a corporation, and whose authority is usurped."

Clark & Marshall in their work on Corporations, vol. I, page 231, say:

"A *de facto* corporation has the same capacity as a *de jure* corporation of entering into contracts, and it is sufficient

therefore to show a *de facto* corporate existence in order to sustain an action by or against an association as a corporation on a note, bond or other contract."

Citing cases in Georgia, Idaho, Illinois, Indiana, Kansas, Massachusetts, Missouri, Nebraska, New York, Vermont, West Virginia, and also Dallas Co. *vs.* Huidekoper, 154 U. S., 654.

As a corporation *de facto* has thus, as against all the world except the State in a direct proceeding, the powers of a *de jure* corporation, a proposition which cannot be controverted successfully, then *in any court*, the Federal as well as State, its right to maintain an action could not be denied, even in the absence of decisive adjudications making accessible the Federal forum to this class of corporations. It seems to us clear, therefore, that even if plaintiff were not a corporation *de jure*, as we contend, it was certainly entitled to a hearing in the Circuit Court of the United States for the Western District of North Carolina, as that court held, and, being a corporation, to all intents and purposes, so far as the jurisdiction of that court is concerned, its right to recover on the merits of the controversies was manifest, for no stockholder of a corporation can, we submit, be permitted to divert the funds of the corporation without the knowledge and consent of the other stockholders, even if he could do so with such consent, to the payment of his individual debts.

(2.)

But we insist that the W. L. Wells Company, the appellant, was a corporation de jure.

The very first section of the charter of plaintiff (R., p. 42) expressly enacts that "W. L. Wells, John T. Wells, and George Butterworth, their associates and assigns, are *hereby* created a body politic and corporate, under the name and style of W. L. Wells Co., and by that name shall have

* * * power to sue and be sued, contract and be contracted with."

Section 833 of the Annotated Code of Mississippi of 1892 provides:

"And the powers therein specified (in the charter of the corporation) shall by the approval of the charter be vested in such corporation, and it shall go into operation at the time and on the terms and conditions specified."

The language in said section 1 of the charter confers, by words *in præsenti* upon the incorporators, a corporate existence, and upon the approval of the charter by the governor, construing the language of the statute literally, it would appear as if the powers specified in the charter were by said approval thereby vested in the corporation. But it is unnecessary to determine this question, because it is undisputed that the charter *was accepted* by the incorporators. In construing this charter, how can these words be ignored? The incorporators were by the very terms of the act created a body politic, with the power to sue and be sued, to contract and be contracted with, under the name and style of W. L. Wells Company. This franchise *of being a corporation* was vested in the incorporators, and gave them the right as stated to sue and be sued as such a corporation.

Mr. Thompson in his Commentaries on the Law of Corporations, section 5336, after quoting the following language from Fietsam *vs.* Hay, 122 Ill., 293:

"That a franchise, or the right to be and act as an artificial body, is vested in the individuals who compose the corporation, and not the corporation itself."

then says:

"But this is an imperfect statement of the true conclusion—which is that a *primary franchise*, that is to say the franchise of being a corporation—vests in the individuals who compose the corporation; while those *secondary franchises* which we shall hereafter see, are *vendible* by the cor-

poration, necessarily, and for that reason alone must be deemed to vest in the corporation."

This court, in Julian *vs.* Central Trust Company, 193 U. S., pp. 93, 106, quotes as follows from Memphis R. R. Co. against Commissioners, 112 U. S., 609:

"The essential properties of corporate existence are quite distinct from the franchises of the corporation. The franchise of being a corporation belongs to the corporators, while the powers and privileges, vested in and to be exercised by the corporate body as such, are the franchises of the corporation. The latter has no power to dispose of the franchise of its members, which may survive in the mere fact of corporate existence, after the corporation has parted with all of its property and all of its franchises."

It will therefore be seen that the mere ownership of property is not necessary for the maintenance of corporate existence. A corporation can dispose of all of its property at one time because it may be to its interest to do so, and then, a few months thereafter, for a like reason, purchase property again; and a dealer in cotton would find no profit, as a rule, in carrying the cotton from one season to another; it is *bought* for *sale*.

It is elementary, of course, that neither the mere purchase nor the sale of the property, as a general rule, affects the corporate existence. The right of the corporation, therefore, to exist *after the sale of all of its property* carries with it necessarily the right to do all that is proper within the limitations of its charter to maintain its existence. Although without a dollar of property, so long as it maintains its corporate existence, it has the right to sue and be sued, to contract and be contracted with, if the charter so permits.

In the case at bar, as we have shown, the franchise of being a corporation is vested in the incorporators, and by the terms of the grant they have the right as such body politic and corporate, to contract and be contracted with, and

this *right is not dependent upon any ownership of property*, either at the organization of the corporation or subsequently.

Being thus created a corporation, with such corporate powers, the plaintiff was a citizen of the State of Mississippi, and, as such citizen, had a right to sue in the Federal court in proper cases where diverse citizenship exists, as in the present instance.

The learned Court of Appeals, as is evident, gave no consideration to this imperative language of the first section of the charter.

In St. Joseph and I. R. Co. *vs.* Shambaugh, 166 Mo., 567; 17 S. W. Rep., p. 581, the court says:

"If, however, the charter confers corporate capacity without any conditions precedent, acceptance of the charter is all that need be shown. In such cases the act of incorporation brings a corporate body into existence. The act of January 22, 1857, declares that there is hereby incorporated a company called the 'St. Joseph & Iowa R. R. Co.' with a capital stock of $2,000,000, and then goes on to designate the persons who shall constitute the first board of directors. No conditions precedent are prescribed. It is a present grant of corporate powers. The corporation came into being upon the acceptance of the charter. It is true the act provides that the directors shall meet and organize—that is to say, organize as a board of directors—and shall open books of subscription to the stock; but the performance of these things, is not made a condition precedent to corporate life. They are but the powers to be exercised by the corporation."

By the acceptance of its charter the plaintiff, as a corporate body, came into existence. The opening of books of subscription and carrying on of business as the buyer and seller of cotton "are but the powers *to be exercised by the corporation" after it was a corporation*, and the failure to pay in the $10,000 could not, we submit, deprive the plaintiff of the right to sue, *any more than the entire extinguishment of all*

its property by sale, or otherwise, would prevent it appearing in court as a suitor.

In Perkins *vs.* Sanders *et al.*, 56 Miss., 733, the "charter of incorporation provided that the persons therein named, and all others who are now, or may hereafter become, associated with them, and their successors and assigns, be and they are hereby, created a body politic and corporate under the name and style of the Perkinsville Manufacturing Company." It was held:

"This was not a proposition to create a corporation upon the performance of precedent conditions, but was itself the creation of a corporation, requiring no other act to be performed by the corporators than their acceptance of the charter by the corporators; and this even was unnecessary, if as it is probable the corporators had applied for the grant of the charter and thus accepted it in advance. Action under the charter would be an acceptance of it."

"The provision 'that the capital stock of said company shall amount to $60,000 * * * and that it shall be divided into shares of $100 each,' did not make the subscription of the $60,000 a condition precedent, to the organization of the company."

The court said:

"In charters which were mere propositions for the organization of a corporation, and which require certain acts to be performed precedent to the existence of the corporation, no corporation can exist, and of course no corporate act can be performed till these conditions have been complied with."

"The distinction between the two classes of charters is thus seen to be, that in the first class the charter is a mere permission on the part of the legislature for the formation of a corporation, upon the doing of certain acts prescribed in the charter as precedent conditions, and, as a necessary result, no corporate act can be done until these conditions have been performed except such as are expressly permitted by the charter; and as to those acts it would be considered that the corporation has an existence before its full investiture with its corporate franchises."

"In the latter case in which is this company, the corpora-

tion is in existence for all the purposes of its creation, from the beginning, except so far as there may be restraints placed upon it by the charter, either expressly or by plain implication."

Even if this plaintiff were embraced *in the first class of cases named* by the supreme court of Mississippi, as its *charter* expressly permits "it to sue and be sued," this action could have been maintained; but the plaintiff belongs to the last class, and is a corporation "created by the very terms of the charter *eo instanti* with its acceptance by the incorporators."

It is to be noticed, also, that the Perkins case involved a proceeding by a creditor's bill against the stockholders of a corporation, to enforce the personal liability of the stockholders for the debts of the company.

That case is essentially different from the one at bar, but, nevertheless, we respectfully maintain that it is clearly an authority sustaining plaintiff's right to sue, and affords no justification for the contention of appellees.

It cannot be denied that the charter of incorporation was duly approved by the governor, and was duly recorded with the Secretary of State and in the office of the chancery clerk in the county of Warren and State of Mississippi, and was duly accepted by the corporators; that books of subscription were opened by said corporators, and that $10,000, capital stock, was subscribed, and that a stockholders' meeting was held on the very same day the corporators met, and that directors were elected, and that W. L. Wells became and acted as president, George Butterworth became and acted as vice-president, and John T. Wells became and acted as secretary and treasurer; that W. L. Wells was reputed to be worth (R., p. 29) from $150,000 to $300,000; that he loaned the company $10,000 on November 14, 1898, and it was not repaid until June 24, 1899 (R., p. 34); that John T. Wells paid for his subscription for five shares or $2,500 stock out of his "part of the profits of the first" year's business; that Mr. Butterworth paid for his $2,500 stock

in the same way, and that W. L. Wells paid for his $5,000 stock in the same manner (R., p. 26), and that at the end of the first year, and before the debt sued on was contracted, there was in the treasury of the corporation over $22,000, net profits, after deducting the $10,000 subscribed for capital stock, and all sums withdrawn by each of the stockholders, or over $32,000 with said capital, and at the end of the second season, when defendant only owed $6,998.18, there was $37,000 in the treasury.

Can it be, under such circumstances, that on the date that the debt sued on was contracted, and on the date of the filing of the suit, this corporation was not *de jure*, because section 2 of the charter prescribed "the capital stock of said corporation shall be $50,000.00, divided into shares of $500.00 each, and as soon as $10,000 of said stock is subscribed and paid for *said corporation shall have power to commence business?*"

Certainly the State, the sovereign which created this corporation, alone had the right to determine, and then only in a proper proceeding, whether this corporation was *de jure* or not, and it is hardly conceivable that if a *quo warranto* proceeding had been instituted, and it was shown that on the date of such institution the corporation had in its treasury three times the amount of the capital stock required to commence business, that a judgment of forfeiture would be rendered!

Would not the attorney general, or any other officer, suing in behalf of the State, have admitted that this corporation *had substantially complied with the provisions of its charter*, and there was no just reason, with all this money in the treasury, why it should be deprived of its prerogatives, its business wound up, and its charter seized? If the State, having the right to condone or overlook a mere failure to comply with one of the provisions of the charter, *has not challenged the existence of plaintiff, and still recognizes it for all intents and purposes as a corporation de jure*, can any court, *at the instance of a defendant*, not the State, and indebted to it

nearly four times the amount of the capital stock required to be paid, declare judicially that it is not a corporation *de jure?*

The subscriptions had been made; the largest incorporator was not only reputed to be worth from fifteen to thirty times the amount of the subscription, but had loaned to the company the full amount of the subscription; the incorporators were liable on their subscription; there were no creditors to enforce personal or other liability; before the defendant contracted these debts the capital was paid in, and therefore even the State would be in no condition to complain.

It was not necessary, according to the authorities, as we have shown, to issue stock; therefore the failure to deliver such certificates to the stockholders does not affect the question. Each stockholder had subscribed for his stock, and with his money in the treasury to pay for the stock he was entitled on his own demand for a certificate therefor.

In considering whether the plaintiff was a corporation *de jure* even so far as the State of Mississippi is concerned, the only State that could deprive it of its charter, it may be pertinent to ascertain what are the rules governing the courts, when the State in a direct proceeding insists that a charter has been forfeited.

Mr. Freeman, in his extended note to State *vs.* Atchison, etc., R. R. Co., 8 American State Rep., 181, 182, and 183, says:

"*Courts proceed with caution in proceedings to declare forfeitures. It is not every excess of power, nor every omission of duty, that is a cause of forfeiture of the charter of a corporation.*

"*Courts act with extreme caution in proceedings which have for their object the forfeiture of corporate franchises.*"

Page 182:

"*A substantial performance of conditions imposed upon the corporation is all that is required.*

"Furthermore, *only such acts or omissions are a cause of forfeiture as concern matters which are of the essence of the contract*

between the State and the corporation, or in other words, in which the public have an interest."

Page 183:

"It is a further rule that, to work a forfeiture of the franchises of a corporation, there must be a willful abuse or improper neglect, or something more than accidental negligence, excess of power, or mistake in the mode of exercising an acknowledged power." (Italics ours.)

Citing—

Angell & Ames on Corporations.
Boone on Corporations.
Morawetz on Corporations.
Waterman on Corporations.
Field on Corporations.

Attention may also be called to the fact that Mr. Freeman cites several Mississippi cases; but the decisions of the supreme court of the State of Mississippi, under whose laws the W. L. Wells Company was created and which alone could recall the grant of corporate franchise, must control in the determination of the question. In State *vs.* Commercial Bank of Manchester, 13 S. & M., 569 and 578, the court said:

"Every suspension of the use of its franchises for a limited time, does not amount to a breach of condition and consequent ground of forfeiture. A reasonable allowance must be made for peculiar circumstances and exigencies. A substantial compliance is all that is required. The fluctuations of commerce may sometimes make it incumbent on a bank to curtail its discounts, or entirely to suspend them, in order to preserve its integrity. The less is thus sacrificed to the greater. The furnishing of a sound and convertible medium of currency is the primary object in the incorporation of banks; the accommodation of those who deal with them, and the benefit of the stockholders are the secondary objects. It is essential to their preservation and safety, that they should cease to issue a circulation, when they have not the means to redeem it. It is right for them to withhold for a time,

until they can gather strength for subsequent operations. Hence expansions and contractions are inseparably interwoven with the banking system. It has its seed-time and its harvest. A reasonable discretion must therefore, of necessity, be allowed to a corporation in the exercise of these powers, on which its very existence depends. It is by no means easy to draw a line which would define the boundary between legitimate acts of prudence, and those which would be an abuse of its franchises. Each case must rest somewhat on its own circumstances."

And the court in that case held that an assignment by a bank to trustees of its assets to pay its debts, where it was made "for the purpose of collecting its debts, paying its own liabilities, and then paying the surplus to the stockholders, "did not authorize the forfeiture of the charter," *although the proceeding was direct, and instituted by the State.* In the later case of Harris, Attorney General, *vs.* Mississippi Valley and Ship Island R. R., 51 Miss., 602, the court held:

"It is not every excess of power, nor every omission of duty that produces the effect of forfeiting a charter. The public must have an interest in the act done, or omitted to be done. If it is confined to the corporation, and in nowise affects the community, it should not be considered as of those conditions upon which the grant is made. The *injunction of the legislature to the courts is to construe the charter favorably and liberally* for the corporation, so as to carry out its purposes. In order to a forfeiture, there must be something wrong done, arising from willful abuse or improper neglect.

"Courts will proceed with extreme caution in proceedings which have for their object the forfeiture of corporate franchises, nor will it be visited except for a plain abuse of power, by which the corporation fails to fulfill the design and purpose of its organization. The acts of misuser, or nonuser, must be touching matters which are of the essence of the contract between the sovereign and the corporation, and they must be willful and repeated.

"A failure of the railroad company to elect directors does not work a dissolution of the corporation, as the old board hold over until their successors are elected and qualified,

and though they may not have had any election since the date of the amended charter it is not dissolved until it has lost its power to perpetuate itself. So long as there remains the capacity of reviving restoration it is not dead."

We therefore submit, *in view of these binding cases*, that if the State of Mississippi, through its Attorney General, had undertaken to call this corporation to account before the debts herein sued for were contracted, and it had been shown, as has been proven in this case, that the charter had been issued creating the incorporators a body politic, with the right to sue and be sued; that the charter had been accepted; that books of subscription were opened and the $10,000 required had been subscribed, one-half thereof by a party reputed to be worth from $150,000 to $300,000, and who in November, 1898, a few months after the acceptance of the charter, had loaned the company $10,000; that the stockholders met and elected directors; that W. L. Wells became and acted as president, George Butterworth as vice-president, and John T. Wells as secretary and treasurer; and that it carried on the business of buying and selling cotton during one season, and had paid, as testified by John T. Wells, the subscription to the capital stock out "of the first year's profits," and that there still remained in the treasury, in addition to the $10,000 capital stock, about $22,000 or more in cash, the Attorney General would not have punished the citizens of that State by depriving them of their corporate rights, and subjecting them to the expense incident to a dissolution of the corporation, and would have voluntarily dismissed the information, because:

(1.) The mere payment of cash at the inception of the organization was not a matter of grave public importance, and its subsequent payment relieved the stockholders from any fault.

(2.) It did not affect the community.

(3.) It was not willful and repeated.

(4.) It was not of the essence of the contract with the sovereign.

(5.) The charter must be construed favorably and liberally for the corporation.

(6.) It is a mere technical matter, and would not have been visited with such dire punishment as the extinguishment or death of the corporation.

Even if the State of Mississippi had the absolute right to declare a forfeiture under the facts mentioned, it also had an *undoubted* right to waive the forfeiture.

Mr. Cook, in his work on Corporations, vol. 2, section 636, 5th ed., says "the State may waive its right to forfeit a charter," and who would doubt *that under these circumstances* the State would have waived such a right?

Certainly, until the State had acted and indicated whether it desired to waive or condone a fault of the character mentioned, no one else has the right to anticipate the purpose or action of the State! Besides, it was discretionary with the State to determine in a direct proceeding to adjudicate a forfeiture, whether or not one or more franchises enjoyed by the corporation should only be annulled, and permit the charter in all other respects to remain unimpaired.

Cook on Corporations, *supra*, section 633, says:

"Taking up first the judgment of *quo warranto* it seems that the judgment in an ordinary *quo warranto* proceeding may be either a forfeiture of all the corporate franchises and of the charter, or may be a forfeiture only of the right to do the illegal acts, and that it is within the discretion of the court to say which judgment shall be rendered."

Under this authority it would, we submit, be proper for the court in a direct proceeding to simply prohibit the W. L. Wells Company from attempting to buy and sell cotton until

the $10,000 *was paid in*, and permit its charter to remain for every other purpose, especially to collect debts due it, in full force and effect.

We maintain, therefore, that *until the State has indicated its displeasure*, or *sought in some manner to punish this corporation*, the courts will uphold the integrity of this organization and declare it a corporation *de jure*.

(3.)

Having thus demonstrated, we submit, *each* of a number of distinct principles of law which sustain the circuit court in retaining jurisdiction, it seems proper to deferentially and respectfully consider some of the points raised in the *opinion of the learned Courts of Appeals*.

The Appellate Court, as we understand the opinion, would have regarded the plaintiff as a corporation *de facto*, and permitted it to sue for this money justly due it, had the court reached the conclusion that the attack on the corporate existence of the plaintiff was collateral, and not direct.

The court says:

"It will be noticed that in all cases in which suits by or against *de facto* corporations were sustained, the ruling is that the corporate existence cannot be collaterally attacked, and in the case before us there is no collateral attack. The plaintiff below put that question directly in issue."

We respectfully contend that the Court of Appeals confounded a principle of law with a form of procedure. *An attack is collateral when not made by the sovereign.* A plea of *nul tiel* corporation, or want of jurisdiction, cannot convert that which is essentially and intrinsically collateral, into a direct attack.

Mere pleadings are ineffectual in any attempt to create rules of law. That is a province of the legislatures, and the highest judicial tribunals.

The court further said:

"When a complainant comes into the circuit court of the United States as complainant, and seeks to sustain the jurisdiction by virtue of its citizenship, it must establish that right in itself and show the credentials of its birth and existence. The fact that as to certain persons and certain transactions it may be a corporation *de facto* is not enough."

We respectfully maintain we have shown that the concluding sentence is not based upon authority. If the corporation is *de facto* to "certain persons and in certain transactions," or, to give it a more concrete application in this case, if the W. L. Wells Company is a corporation *de facto*, and especially as to the Gastonia Cotton Manufacturing Company, to which it sold many thousand dollars' worth of cotton as a corporation, is a corporation *de facto*, the establishment *of that fact* is *enough* to enable it to recover the money due it in those cotton "transactions." Once establish a corporation to be *de facto*, then it is necessarily a *de facto* corporation *for all* purposes, and only the *State*, and not third persons or the courts, can attack its corporate existence.

Nor can a person contracting with such a corporation *de facto*, when it seeks to recover on such contract, plead in any guise that the corporation is only *de facto*, and in such a case a court cannot deny its jurisdiction.

To repeat our citation from the text of Clark & Marshall on Corporations, vol. I, 231—

"A *de facto* corporation has the same capacity as a *de jure* corporation to enter into contracts, and it is sufficient, therefore, to show a *de facto* corporate existence in order to sustain an action by or against an association as a corporation on a note, bond, or other contract, or in order to defeat an action against the stockholders or members of an association as individuals on a note, or other contract, made by them as a corporation."

Citing for the last proposition Colorado, Florida, Georgia, Maryland, Texas, Michigan, Illinois, Minnesota, Pennsyl-

vania, Nebraska, New Hampshire, New Jersey, Ohio, Vermont, and Wisconsin cases, and for the first proposition, as already shown, Georgia, Idaho, Illinois, Indiana, Kansas, Massachusetts, Missouri, Nebraska, New York, Vermont, West Virginia, and Federal cases.

To the failure to recognize or attach weight to this undoubted principle, is attributable the *erroneous conclusion* reached.

An error was also committed in holding that the payment of the $10,000 capital stock was a *condition precedent* to the granting of the franchise to carry on the business of buying and selling cotton, and in failing to uphold the first section of the charter to which we have alluded, wherein the incorporators were expressly created by words *in præsenti* "a body politic and corporate."

The court quotes from Beach on Private Corporations, section 12, page 18, as follows:

"There is a broad and obvious distinction between such acts as are declared to be necessary steps in the process of incorporation, and such as are required of the individuals seeking to become incorporated, but which are not made requisite to the assumption of the corporate powers. In respect to the former, any material omissions will be fatal to the existence of the corporation, and may be taken advantage of collaterally, in any forum in which the fact of incorporation can properly be called into question."

The court also quotes from the same author, on page 27:

"It is immaterial that the persons attempting incorporation have acted in good faith, and have actually carried on business under their supposed authority to act as a body corporate."

These quotations appear in section 16 of 1st edition of Beach on Private Corporations, and the first quotation is based in that edition upon Mockelumne Hill Mining Co. *vs.* Woodbury, 14 Cal., 424, to which we have already re-

ferred. We have also referred to California cases sustaining, we submit, our contention.

Mr. Beach evidently had in mind in the preparation of his text an entirely different state of facts, and was dealing with an entirely different class of corporations from that presented by this record, and his citation of the Iowa case and the California case shows that he was enunciating a principle of law inapplicable here.

It is unnecessary now to consider the proposition, what may be the effect of failure to comply with acts "declared to be necessary steps in the process of incorporation," or the ruling that "mere good faith in attempting incorporation, and actually carrying on business under its supposed authority, is immaterial in determining whether said corporation is valid." These questions cannot properly arise on this record.

The language of the text last quoted is supported by Kaiser *vs.* Lawrence Savings Bank, 56 Ia., page 104, and it may be proper to refer more at length to that case by quoting from Mr. Bishop's note

He says:

"This was an action against one of the proprietors of a savings bank to recover money deposited therein. The defense was that the bank was a corporation, and that it was sufficient in order to establish the corporate existence of the bank as against the plaintiff merely to show authority to create a corporation, a *bona fide* attempt on the part of the corporators to become incorporated, and the doing of business as a corporation; and in support of this position the defendant cited Buffalo & A. R. Co. *v.* Cary, 26 N. Y., 77; Kurtz *v.* Paola Town Co., 20 Kan., 403, and Papee *v.* Capital Bank, 20 Kan., 440.

"But the court distinguishes these cases on the ground that in them the defendant had set up the want of incorporation of the plaintiffs, thereby seeking to escape liability, while in the case at bar the defendant sets up exemption, averring that the attempt to become incorporated and the doing of business under a claim of incorporation were sufficient to create the exemption."

It will thus be seen that the Kaiser case is inferentially an authority for the plaintiff, because it recognized, at least impliedly, that a *defendant* who has contracted with an alleged corporation cannot escape liability because the corporation with which it dealt was imperfectly organized, by the very fact that it refers to cases maintaining that doctrine. It simply creates a distinction by holding that a *creditor of such* a corporation is not estopped.

The defendant in this case is of course not a creditor, but a debtor, and the Kaiser case, even if it were supported by, and not opposed to, the great weight of authority, is not in point, and therefore it affords no foundation for the judgment in this case.

Reference to several Iowa cases in this connection is relevant. In Washington College *vs.* Duke, 14 Ia., 14, it was urged that, although an attempt had been made in July, 1854, to form the corporation, yet it could not be brought into being until the articles of incorporation were duly recorded, as required by law, and this did not occur until November 12, 1858, and hence it had no power to contract, &c. The court held, under section 704 of the Iowa Code of 1851, "that no person sued on a contract with such a corporation should be permitted to set up a want of legal organization as a defense."

In McKinley-Lanning Loan and Trust Co. *vs.* Gordon, 113 Ia., 481, it appears that the plaintiff, a foreign corporation, sold land to the defendant, taking a note therefor, and the court held that the defendant was estopped from claiming plaintiff had no title, as only the State can make that defense.

The court said:

"Where plaintiff, a foreign corporation, claims a note and mortgage in suit for a part payment of land sold the defendant, the latter cannot maintain that plaintiff has no title

because plaintiff cannot hold land under the laws of the State, since that defense was available only to the State."

See also—

Watts *vs.* Equitable Mutual Life Insurance Co., 111 Ia., pp. 90 and 95.

White *vs.* Marquadt *et al.*, 105 Ia., p. 145.

Beach *et al. vs.* Wakefield, 107 Ia., p. 567.

In the latter case the following qnotation from Twiss *vs.* Association, 87 Iowa, 733, is approved:

"Where an *ultra vires* contract is made and performed on one side, the other party cannot be permitted to enjoy the benefits received, but will be required in a proper action to account. In other words, the doctrine of a want of power to contract cannot be invoked to aid a party to perpetrate a wrong and injustice."

In Seaton *et al. vs.* Grimm *et al.*, 110 Ia., 145; 81 N. W. Rep., 225, the court held:

"A corporation's stockholders, who executed its articles of incorporation, and became officers and directors, and dealt with it as a legal entity, are estopped to deny the legality of the corporation on the ground that legal notice of its incorporation was not published."

This case was decided December 16, 1899, about eighteen years after the decision in the Kaiser case.

The court says:

"The great weight of authority, in the absence of a statute, is that where a supposed corporation is doing business as a *de facto* corporation, the stockholders cannot be held liable as partners, although there have been irregularities, omissions, or mistakes in incorporation or organizing the corporation. And the greater number of cases seem to favor the proposition that statutes such as the one we are now considering are penal in character."

The court referred to Stokes *vs.* Findlay, 4 McCrary, 205, a case in which a bank business was commenced without paid-up capital, without a sworn statement of its paid-up capital, and without a certificate of the auditor authorizing it to commence business—all things required by the statute.

Mr. Beach, however, section 13, sustains the rule for which we contend. He says:

"An association of persons assuming to act in a corporate capacity under color of authority so to do, thereby become a corporation *de facto;* and neither they themselves, nor persons dealing with them will be heard to deny collaterally their legal existence as a corporation in any action growing out of their acts or contracts in that capacity. Their *de jure* existence can be called into question only by proceedings in the nature of *quo warranto* instituted by the State. Thus when individuals have been granted a charter upon a *condition precedent* and are actually exercising corporate powers, it will be presumed as against all, except the sovereign, that the condition has been performed."

Section 14:

"The principle that the legality of corporate existence cannot be questioned collaterally, but can be impeached only by the State in direct proceedings for that purpose, applies as well to companies organized under general laws as those created by special charter."

And in the concluding sentence of section 16, from which the court quotes, he says:

"And neither the company itself, nor one who has dealt with it as a corporation, will be heard to deny the regularity of its organization."

The case of Perkins *vs.* Sanders, 56 Miss., 733, to which reference is made in the opinion, is, as we have shown, an authority for the plaintiff, and not for the defendant.

Besides, it is settled law in the State of Mississippi that the failure to pay for the capital stock cannot be questioned

by a debtor of such corporation, and can only be raised by the State.

Smith *et al. vs.* The Mississippi & Alabama R. R. Co., 6 S. and M., p. 179.

It may be further observed that under chapter 25, Annotated Code of 1892, no specified amount of capital stock is prescribed, and that section 838 is only a limitation upon the amount of property a corporation can hold.

Under this chapter articles of incorporation are prepared by the parties who desire to organize as a corporation, and the right to *determine the amount of capital stock* is vested in them. The W. L. Wells Company could have been incorporated with $100 capital, and could have commenced business with a less capital than $100. There is nothing in the statute which makes the acts of a corporation doing business with an insufficient capital void, and under such statutes, as construed by the courts, the acts of such corporation are valid as against a debtor.

In the case of Whitney *vs.* Wyman, 101 U. S., 392, already cited, the statute required the articles of association to be filed with the Secretary of State, before the corporation should commence business. The court said:

"The restriction imposed by the statute is a simple inhibition. It did not declare that what was done should be void, nor was any penalty prescribed. No one but the State could object."

In Hammond *vs.* Strauss, 53 Md., page 1 (where the language prohibiting the commencement of business was more emphatic than in the present charter), the court said:

"An act of the legislature of the State of Maryland, by the first section, declared the parties therein named and their successors in office to be, and they are hereby, constituted and made a body corporate and politic, under the name and style of the Union Banking Company of Baltimore. The fourth section of this act provided that when 'twenty-five per

cent. of the minimum capital stock shall have been paid in and so certified by the majority of said corporation, to the treasurer and comptroller of the State, and a certificate of their organization transmitted to the clerk of the court of appeals to be by him recorded in his office, and *not before* shall they be entitled to all the benefits and privileges herein conveyed or intended to be conveyed.' This twenty-five per cent. was not paid in and no certificate was filed, yet the court in that case said, 'There is nothing in this language that imports a condition precedent to the existence of a corporation.' The court further said: 'As we have seen the act by its terms constitutes and declares the incorporators therein named a body corporate; and upon their acceptance of the act, if it was accepted, the corporation was brought into existence without anything more, by the force of the statute itself. There was no condition precedent prescribed to the mere existence of the corporation, after the acceptance of a charter, and in such cases it has often been decided that the corporation is *in esse*.'"

In Harrod *vs.* Hammer, 32 Wis., 162, the court said:

"The corporation was organized under chapter 73, of the Revised Statutes. It is not objected or shown that any requirement of the statute was omitted or not complied with, except only that the certificate prescribed by section 17 was not made and deposited with the secretary of state, and a duplicate with the village or city clerk, as therein directed. The only question, therefore, is whether this failure of the president and directors to make and deposit the certificate and duplicate, operated to defeat the organization or to annul the proceedings by which the corporation was brought into existence. The very words of the section are a sufficient answer—'that before any corporation, formed and established by virtue of the provisions of this law, shall commence business, the president and directors shall cause their articles of association to be published,' etc., and 'shall make a certificate,' etc. It would not be easy by any words to recognize the existence of the corporation without the publication and without the certificate, or before they are made, more clearly than has been done here. The corporate existence is clearly acknowledged, and intended to be so, and the prohibition is only against it commencing business until the requirements are complied with. It is spoken of as a corporation formed and established by virtue of the provisions of law."

In Smith *vs.* Sheeley, 12 Wallace, 358, as we have shown, the bank was without *authority to do* business, as its charter had not been approved by Congress, yet its contract was upheld, as a matter of course, and without citations of authority.

Even where there is a condition precedent the right to recover is maintained. The distinction between want of authority, and the failure to comply with the conditions precedent is graphically stated in Sherwood *vs.* Alvis, 83 Ala., 115, where a contract made by a foreign corporation in disregard of article 14, section 4, of the constitution of Alabama, which declares that no foreign corporation shall do any business in the State without having a resident agent and a known place of business, will be upheld, and that the other party to the contract "is estopped from pleading its invalidity on this account, after having received the benefits," the court said:

"*The distinction is between an entire absence of authority in the organic law itself, and the failure to comply with some prerequisite which the law has made a condition precedent to the exercise of corporate functions.*" (Italics ours.)

"In the one case, there is want of power to act; in the other only an abuse of power conferred."

Must it not be admitted that this rule strikingly presented is eminently just and should be always enforced?

We also maintain that undue importance is attached to the words "good faith" in connection with an attempt to organize a *de facto* corporation. The definition of a *de facto* corporation by the Supreme Court of the United States in Tulare Irrigation District case, as we have stated, does not embrace the words "*good faith*," and this authority is conclusive, and is also in harmony with the leading cases in State courts.

It is true that some of the text-writers and some of the cases refer to a "*bona fide*" attempt to organize a corporation, and in Tulare Irrigation District case this court found that

there was undoubtedly "a *bona fide* attempt to organize," but unless a distinct definition is given to the words "*bona fide*," so that it can be always clearly understood what is meant when they are used by the courts, it would always be difficult to determine their applicability in considering the prerequisites of a corporation *de facto*.

If the incorporators violated a law, how can they be regarded as acting in good faith in one sense? Yet, in Sherwood *vs.* Alvis, 83 Ala., 115, *supra*, the corporation proceeded in violation of the constitution of Alabama.

In Smith *vs.* Sheeley, 12 Wallace, 358, *supra*, the bank engaged in a transaction which was upheld in violation of an act of Congress.

In Whitney *vs.* Wyman, 101 U. S., 392, the transaction under consideration violated an act of the State of Michigan.

In Hammond *vs.* Strauss, 53 Maryland, *supra*, the banking company disregarded the statute of Maryland.

In Harrod *vs.* Hammer, 32 Wis., 162, there was a failure to observe the statute of Wisconsin.

In Gumbel *et al. vs.* Johnstone, 19 Sou. Rep., 100, and in Fargason *vs.* Mercantile Co., 78 Miss., 65, the laws of the State of Mississippi were violated.

In the recent case of McCandless *et al. vs.* Inland Acid Co., supreme court of Ga., July 22, 1902, 42 Sou. East. Rep., 449, it was contended that 10 per cent. of the capital required by law to be paid in had not been paid.

The court said:

"It is no concern of a debtor of a corporation, or of a person who is wrongfully withholding property belonging to it, that it has not complied with the conditions precedent in its charter or has laid its charter subject to forfeiture by a non-user or mis-user of corporate powers."

In First Nat'l Bank of Salem *vs.* Almy *et al.*, 117 Mass., 476, it was held:

"Members of a corporation to whom a certificate of organization as a corporation has been issued by the secretary of

the Commonwealth in accordance with the statute of 1870, chap. 224, are not liable as partners, by reason of having transacted business before the whole of the capital stock has been paid in in violation of sec. 32 of that statute."

Mr. Cook on Corporations, fifth edition, section 637, 1423, note 3, says:

"Where a corporation sues for the price of articles sold, the defendant cannot set up that the plaintiff sold the articles before its capital stock was fully paid up, as required by statute."

Citing—

Chase *et al. vs.* Boston *et al.* Co., 152 Mass., p. 428.
McCord, etc., *vs.* Glenn, 6 Utah, 139.

We again quote from Clark and Marshall on Corporations, volume I, 258–259:

"There may be a corporation *de facto*, the existence of which cannot be attacked collaterally, * * * though the capital stock or a certain per cent. thereof was not subscribed or paid, as required by the statute."

We have also cited Michigan and Illinois cases where the capital stock was not paid.

In American Salt Co. *vs.* Heidenheimer, 80 Texas, 344, *supra*, the articles of incorporation were signed by persons none of whom were citizens of Texas, although the statute required the signatures of residents. All of these cases show direct violations of law, which the court always condoned, and necessarily held that there was not such a want of "good faith" as would justify the extinction of the corporation and a denial of justice. The term "good faith," when used in this connection, must therefore be the antithesis of "bad faith," and when the latter words are used in the sense of "moral turpitude," a premeditated design to deceive and defraud; in other words, if the W. L. Wells Company had

falsely pretended to organize, with the design and purpose to cheat and defraud its creditors, making the corporation a cloak for evil purposes, then the legality of the organization might be open to question. But there is nothing in this case to impugn its good faith or to show that it intended to defraud any person out of one dollar. There is also a vast distinction between the case at bar and those upon which it rests, and the few cases to which we will hereinafter refer, *which expressly prohibit the exercise of any corporate powers by the very terms of the statute until certain prerequisites are complied with.*

The proposition that as consent *cannot* confer jurisdiction estoppel does not, even if sound, which we do not admit, has no bearing upon any point at issue, and its consideration injects a foreign and immaterial matter into the subject under review. It could have no relevancy, we submit, unless it is conceded that logically, as well in the material world, *a foundation* can be safely built upon its *superstructure*. The basic principle here is that the plaintiff is at least a corporation *de facto*, created such by law, even without the application of the doctrine of estoppel, and if it *is* a corporation *de facto jurisdiction* necessarily exists with or without consent. Mere consent cannot create a corporation *de facto* if the prerequisites did not exist, and does not confer jurisdiction; but when a corporation *de facto* exists, either by estoppel or otherwise, *so far as jurisdiction is concerned*, it is to all intents and purposes a *corporation de jure*. This distinction was overlooked, and error therefore resulted.

The Circuit Court and the Court of Appeals not only differed about the law, but did not agree upon the facts. To show how widely divergent are the views of the two courts, we contrast them in parallel columns:

THE CIRCUIT COURT said:

"Is the W. L. Wells Company a corporation of the State of Mississippi? * * * It is the opinion of the court that the evidence is conclusive upon this point.

"The evidence on this point (that the plaintiff was a corporation) is uncontradicted, and consists of a charter duly issued under the laws of the State of Mississippi, creating a corporation to be called the W. L. Wells Company, in which W. L. Wells, John T. Wells, and George Butterworth are named as corporators, authorizing the organization of said corporation with a capital stock of $50,000, the purpose of the corporation being to deal in cotton, to begin business as such dealer when the sum of $10,000 of the capital stock was paid in. Under the authority of this act of incorporation the corporators, met, organized, and elected W. L. Wells president of the company. One of the other corporators as secretary and treasurer. Thereupon a charter or certificate of incorporation was duly issued to the said company by the proper authorities of Mississippi, and the company commenced business. The $10,000.00 of capital stock

THE COURT OF APPEALS said:

"The governor having sealed the charter, the incorporators met on 18th July, 1898, read over and adopted it. Books of subscription were then opened, and W. L. Wells, subscribed for ten shares, John T. Wells for five shares, and George Butterworth for five shares. On the same day and at the same place a stockholders' meeting was held, and W. L. Wells, John T. Wells and George Butterworth were elected directors. The meeting thereupon adjourned, and the record does not disclose whether they ever met again or not. John T. Wells, who was secretary and treasurer of the company, says, then when the stock was subscribed for nothing was paid; that he paid for the stock out of the profits of the first year, so did Butterworth, and so did W. L. Wells. Yet, he says that these profits were never divided, no dividend was ever declared, no money carried to credit of any stockholder, no stock certificate ever issued.

"He goes on to say that he never paid any cash into the Wells Co. Nor did Butterworth, nor did W. L. Wells, and that there was absolutely no capital to start with. That notwithstanding, he drew out

was not paid at first, but the undisputed testimony is that the net profits of the company for the first year of its business was $37,000 and from this amount the required $10,000 of capital stock was paid in. The dealings of defendant with the plaintiff commenced soon after the corporation was organized, but the account between them for the first year had all been settled up, and the account upon which this controversy arises is based on transactions subsequent to the first year of plaintiff's existence as a corporation, and after the $10,000, of capital stock had been paid in, so that plaintiff had not only organized as a corporation, under the provisions of law, but according to the evidence the $10,000 of capital stock had been paid anterior to the time the cause of action in this case arose. *All of the transactions which the defendant had with the plaintiff were in its corporate capacity as the W. L. Wells Company. Every letter of the plaintiff to defendant (and there are a great many of them) concerning the sale and delivery of cotton for which the plaintiff sues, is upon paper headed, 'The W. L. Wells Company, Incorporated,' and the defendants in answer to these letters, and in making orders for cotton to be shipped* $10,217.55 and Butterworth took $9,022.65. Both he and Butterworth being men of small means, having no property liable for their debts. It is very clear from this that having a charter like this conditioned upon the payment of $10,000.00 in subscriptions, then these men undertook to exercise powers in the charter without fulfilling, or attempting to fulfill, the conditions precedent in the charter. That even when they had made money in the business they ignored the corporation altogether, and drew the money out of the business as if it belonged to them, and not the corporation. The charter never went into operation, and the corporation never became a legal entity. More than this these assumed corporators went on in business, contracted obligations in the name of the so-called corporation, which did not possess a dollar of property, or have any mode of meeting a debt, thus seeking to cloak their transactions under an assumed corporate name, and avoid in this way all personal liability. At the same time two of them were in a business sense, irresponsible. It would seem that this transaction was an abuse of and a fraud of the law. And that Wells Company had never,

to the mills, in every instance addressed the W. L. Wells Company; the bills of the W. L. Wells Co., and the checks sent by the defendant in making payments were all payable to the said company." (Italics ours.)

and could not have any legal existence."

It is, of course, evident that *both* of these *opposing* views *cannot* be correct, and a simple analysis of the material testimony, in the light of the law applicable to this case, will show that the *circuit* court did *not* err.

The Court of Appeals admitted that John T. Wells says "that he paid for the stock out of the profits of the first year, so did Butterworth, and so did W. L. Wells."

This testimony is undisputed, nor is his further statement under oath that the profits for the first two years were over $61,000, and as the books were before the trial court (John T. Wells even referring to the pages of the ledger in his testimony, R., p. 17), it must be *conclusively presumed* that if the defendant doubted these statements a vigorous effort would have been made to impeach them, especially with the books of the corporation thus accessible.

The Court of Appeals further states:

"Yet he (John T. Wells) says these profits were never divided, no dividend was ever declared, no money carried to credit of any stockholder, no stock certificates ever issued."

None of these things *singly*, nor will *all* of them *collectively*, sustain any attack upon the corporate organization.

We again quote from Cook on Corporations, 5th edition, section 13:

"It should be clearly understood that the certificate is not the stock, but merely written evidence of the ownership of stock.

"A certificate, therefore, has value in itself as evidence,

but apart from the share which it represents, it is utterly worthless.

"It is not essential to the existence of the corporation that certificates of stock be issued. Without a certificate a stockholder has a complete power to transfer his stock, to receive dividends, and to vote, and he is individually liable as a stockholder.

"Stock may be transferred without a transfer of the certificate."

But does not the fact that *no profits were divided*, no dividends *declared*, and no money carried to the credit of any stockholder, *establish the good faith of the corporators?*

It seems to us the retention of all these profits, netting over $37,000 at the end of the second year, when the defendant only owed the plaintiff $6,998.13 (R., p. 17), after deducting all sums withdrawn by the stockholders, should not only have shielded the plaintiff from reprobation or censure, but really afforded cause for *praise*, not only from a creditor of the corporation, if there were any in existence, but certainly merited *the approval of this defendant*, for *this fact probably* enabled the *plaintiff to sell* the *defendant* such large quantities of cotton upon a credit, *the proceeds of which it still owes and still enjoys.*

The Court of Appeals referred also to the amounts drawn out by John T. Wells, $10,217.55, and by Butterworth, $9,022.65. It is to be noticed that these were the *total* amounts withdrawn by these two gentlemen, and there is nothing in the evidence to show how much profits W. L. Wells Company had realized *at the end of its third* year's business. The testimony, however, shows that John T. Wells only drew out the first year $1,813.23, the second year $3,008.91, or a total of $4,822.14; that Butterworth drew out the first year $2,343.44, and the second year $3,741.55, a total of $6,084.99, and thus the aggregate amount withdrawn by these two stockholders for the first two years was only $10,907.13.

Can the fact that John T. Wells and Butterworth were "men of small means" or had "no property liable for their debts" *when the corporation was organized*, or thereafter, affect the question at issue? Whatever might have been their financial condition in 1898, in 1899, according to the *uncontradicted* testimony, John T. Wells' interest, as a stockholder, was worth, including his $2,500 subscription, $7,400, and in 1900, before all the debt sued on, except $6,998.13, was contracted, it amounted to $10,400, after deducting all he had withdrawn.

George Butterworth's interest amounted, at the end of the first year, to $6,900, including his interest in the capital stock, and at the end of the second year to over $9,100, so that Butterworth and John T. Wells were worth at the end of the second year nearly $20,000. Besides, there is nothing in this record which reflects upon the *integrity* and *capacity* of John T. Wells and George Butterworth, and the fact that they were "men of small means," at the inception of the business, did not affect their capacity or integrity, and assuredly that was a matter of no concern to this defendant.

The Court of Appeals also charges "these assumed corporators went on in business, contracted obligations in the name of the so-called corporation, which did not possess a dollar of property or have any mode of meeting a debt, thus seeking to cloak their transactions under an assumed corporate name and avoid in this way all personal responsibility."

If these corporators "contracted obligations in the name of the so-called corporation" certainly no one has the right to complain except the holder of those "obligations;" and *as there was no such holder before the court*, the relevancy of the observation is not apparent.

It was admitted by this defendant, both in its pleadings and in open court, that it, the defendant, owed a large sum of money, not to W. L. Wells individually, but to the firm or corporation of W. L. Wells Company, after deducting all it

claimed W. L. Wells owed it individually, and therefore certainly it had no interest in the question whether the W. L. Wells Company, either as a firm or a corporation, had not only contracted but was still owing "obligations" of either $1 or a $100,000.

It is also undisputed that W. L. Wells is a man of means, reputed to be worth at least from thirty times to sixty times his subscription of $5,000, and that he loaned the company in 1898 $10,000 and furnished it credit with which to start business. W. L. Wells is the man who this defendant charges has not only subscribed $50,000 to a charter of a North Carolina corporation to be formed by the manager of this defendant, but this very $50,000 was abstracted without his knowledge and consent from the assets of the W. L. Wells Company by the defendant, its excuse being that it was the property of W. L. Wells, and certainly therefore W. L. Wells' liability on his subscription for the sum of $5,000 was *a most valuable* asset at the date of the commencement of business of the W. L. Wells Company, and most assuredly furnished that company with a "mode of meeting a debt," even if there were any debts on that date or at the end of the first or second year, of which there is no proof.

It is *also undisputed and indisputable* that at the end of the very first year there was in the treasury of the company, after deducting the amount each stockholder had withdrawn, $32,000, and at the end of the second year over $37,000, and certainly all this money was "property" and furnished "a mode of meeting debts," even if it had any.

It is pertinent also to note that on November 13, 1899, *when this suit could not have been anticipated*, the W. L. Wells Co., by its letter of that date, wrote to John F. Love, Treasurer of the defendant, among other things, as follows (R., p. 115):

"Up to this date we have shipped you in round figures $65,000.00 of cotton, which is about our capacity, without borrowing from our banks, and this we do not care to do for

reasons given in our last. Now, what we want you to do is to arrange for money so that we won't have to carry you for say, to exceed $60,000 or $70,000."

This letter was signed W. L. Wells Company. That company on November 8 wrote to Jno. F. Love, Treasurer, also, among other things, as follows (R., p. 114):

"Of course, as far as our capacity goes, count on that, but it is a matter only of fifty to sixty thousand dollars, which at present prices of cotton won't go very far towards getting your supplies."

It will therefore be seen *that at a time when there was no reason for a misrepresentation*, when the defendant was receiving the benefit of the credit and capital of plaintiff by obtaining its raw material on a credit, at that time, *the plaintiff furnished* the evidence to defendant, by means of letters in the possession of defendant, that it *had then a capacity of fifty thousand to sixty-five thousand dollars, without borrowing* from the banks.

Did it not then possess "property" many times the value of a dollar, and did it not then have "modes of meeting a debt"? There can be but one answer to these questions.

It is undeniable, also, that the defendant did business with the plaintiff during the first year of the latter's corporate existence and paid it all it owed, and that in 1898, when the W. L. Wells Co. was formed and commenced business, there was no pretense whatever that W. L. Wells had subscribed for a dollar's worth of stock in the Loray mills, or in any other corporation controlled by the defendant.

Therefore *for a whole year at least* this plaintiff, as a corporation, did business with the defendant without any of its corporators being under any sort of personal liability or personal responsibility to the defendant *for a single dollar*.

We insist, also, that the very fact that the defendant owed the plaintiff the sum of $39,313.88 on June 20, 1902, for which a judgment was rendered, and that the Avon mills owed the

the plaintiff at the time of the trial $27,100.19, exclusive of interest—or a total of $66,414.07—*is conclusive evidence* that the plaintiff *did* possess "property" and did have modes "of meeting a debt."

At the time of rendition of said judgment the plaintiff had property (if the debt due by the defendant to the plaintiff is considered property) amounting to $66,414.07, and they practically owed, according to the testimony (R., p. 37), only $27,100.19, this being the debt due the Merchants' National Bank. Therefore at that time, assuming that the defendant could be made to pay its honest debts to the plaintiff, the plaintiff was worth over and above all of its debts *at least $39,313.88*. Consequently there was no reason for the "corporators to cloak their transactions under an assumed corporate name, and to avoid in this way all personal liability," for they had no personal liability, and the corporation had an abundance of means to meet its debts, and the charge, we submit, is not sustained by any evidence in this record.

It is further charged "that even when they (the corporators) had made money in the business they ignored the corporation altogether, and drew the money out of the business as if it belonged to them and not the corporation."

The right of stockholders, not receiving salaries, to be paid by the corporation of which they are stockholders money from time to time for their personal needs, when the corporation is solvent, is not open to question.

We submit that the evidence also shows that the corporators had "not ignored the corporation altogether." The proof is undisputed that *all* of the *many transactions* of this *plaintiff* with *this* defendant *were carried on in the corporate name, that name alone being used.*

The circuit court found, as the evidence establishes, "every letter of the defendant (and there are a great many of them) concerning the sale and delivery of cotton for which the plaintiff sues is upon paper headed, 'The W. L. Wells Company, Incorporated,' and the defendants, in answer to these

letters, in making orders for cotton to be shipped to the mills, in every instance addressed the W. L. Wells Company. The bills of lading for cotton shipped the defendants were made out in the name of W. L. Wells Company, and the checks sent by the defendant in making payments were all made out payable to the W. L. Wells Company." The invoices for the season 1899–1900, as shown by the exhibit in evidence (R., pp. 5 and 6), were *19 in number;* for the next season, 12. Thus there were 31 separate invoices. Remittances for the first season were 8 in number.

The evidence further shows that "statements of account" in the name of W. L. Wells Company were duly rendered to the plaintiff without objection or protest. Therefore, to sum up, it is undeniable, both from the evidence and admissions of defendant, that the plaintiff sold cotton to *the defendant* as a corporation and in its corporate name, and the defendant received it from plaintiff as a corporation and in its corporate name. Said cotton between October 19, 1899, and December 18, 1900, amounted to 2,483 bales, and was of the aggregate value of $111,365.59, and therefore, so far as the transactions upon which this suit is based are concerned, neither "the corporators" nor the defendant "ignored the corporation."

It is significant to note in this connection that the defendant knew and acted in other ways as if there was a corporation, and that W. L. Wells individually and W. L. Wells Company were not the same.

On October 4, 1900, W. L. Wells wrote to John F. Love (R., p. 62) as follows:

"I am going to make a change in my present firm after this season, so do not want my arrangement with you and the Loray made known to them, hence in writing me about this please mark your letters personal."

A request with which John F. Love complied.

John F. Love, on cross-examination (R., p. 96), was asked:

"Q. How did you suppose that you and Mr. Wells were

going to keep this away from Mr. Butterworth and Mr. John T. Wells, if it was to be paid out of the firm's cotton as you say?

"A. We did not know how we were to arrange it, he left it entirely with me."

Thus the defendant conclusively recognized that the subscription of W. L. Wells was *personal*, and that the cotton it was *receiving belonged to W. L. Wells Co.*

We submit, therefore, that the errors in the proceeding in the Court of Appeals are manifest, and that this plaintiff is entitled to recover as the circuit court had adjudged.

This brief may have been unnecessarily extended, but the magnitude of the amount involved is, we trust, justification, and we will now conclude by briefly referring to some of the cases cited

(4.)

IN THE BRIEF FOR RESPONDENT IN OPPOSITION TO THE PETITION FOR WRIT OF CERTIORARI.

On pages 60 and 61 of this brief it is insisted that the Federal court has no jurisdiction over a *de facto* corporation, but no cases are cited sustaining that proposition; and we, with all due respect, submit that none of the cases cited in the brief are controlling upon the facts presented by this record, and the principles of law relied on are, as a rule, merely abstract, so far as this case is concerned, and cannot be availed of by the respondent here.

Among other cases cited is Kaiser *vs.* Lawrence, 56 Ia., page 104, which, as we have already shown, involves simply an attempt to make the stockholders of a corporation illegally formed liable to the creditors of such corporation as copartners.

Reference is also made to Bigelow *vs.* Gregory, 73 Ill.,

127, cited in Kaiser *vs.* Lawrence, *supra*. In the latter case the supreme court of Illinois expressly held:

"That there is a manifest difference where a corporation is created by special charter, and there have been acts of user and where individuals seek to form themselves into a corporation under a general law. In the latter case it is only in pursuance of the provisions of the statute for such purpose that corporate existence can be acquired. *And there would seem to be a distinction between a case where, in a suit between a corporation and a stockholder, or other individuals the plea of nul tiel corporation is set up to defeat a liability which he may have contracted with the other* (this is the case at bar—italics ours), and the case of a suit against individuals who claimed exemption from individual liability on the ground of their having become a corporation formed under the provisions of a general statute. In the latter case a stricter measure of compliance with statutory requirements will be required than in the former."

Besides, the supreme court of Illinois in the cases already cited, and in much later cases to which we will now refer, have maintained the doctrine that a *de facto* corporation has a standing in court, and the defendant which has dealt with it as a corporation, and owes it as a corporation, is estopped to assail its corporate existence.

In Gunderson *et al. vs.* Illinois Trust and Savings Bank *et al.*, October 25, 1902, 65 N. E. Rep., 326, the supreme court of Illinois said:

"A corporation may be one *de facto* although not completely organized in accordance with the provisions of the statute. Bushnell *vs.* Machine Co. 138 Ill., 67. * * * But if an association is in the exercise and use of corporate franchises under color of legal organization, in pursuance of a general law, it is a corporation *de facto* as to third persons dealing with it and subject to the same liabilities as corporations regularly and legally organized."

In Lincoln Park Chapter No. 177, R. A. M., *vs.* Swatek *et al.*, October 26, 1903, 68 N. E. Rep., 429, the supreme court of Illinois said:

"The general rule is that one who deals with a corporation as existing *de facto* is estopped to deny, as against it, that it has been legally organized. Bushnell *vs.* Consolidated Ice Machine Co., 138 Ill., 67 * * * It is for the State alone to complain of any mis-user or non-user of the powers conferred in the creation of the corporation. Citing Coquard *vs.* Nat'l Linseed Oil Co., 171 Ill., 480."

In Bergeron *vs.* Hobbs, 96 Mo., 641; 65 Am. St. Rep., 85, the supreme court of Wisconsin simply enforced the laws of the State of Wisconsin holding "until articles of incorporation are filed in the office of the register of deeds of the county, there is no color of legal right to act as a corporation. The filing of such paper is a condition precedent to the right to so act."

The Revised Statutes of Wisconsin expressly prescribed:

"No corporation shall until such articles (of incorporation) be so filed for record have existence."

This case also presents the question of the liability of the stockholders of an illegal corporation to the creditors of that corporation, and not the right of a debtor of that corporation to defeat liability by reason of some defect in the organization.

Justice Marshall in that case filed a powerful dissenting opinion, reviewing quite a number of cases.

Wexelburg *vs.* Flower City Nat'l Bank, 64 Fed. Rep., 90, also involved the construction of said statute of Wisconsin, and also maintained that the signers of the articles "having failed to comply with the law, are liable for the debt contracted in the name of the corporation."

The later case of Gilliam *vs.* Druse, October 15, 1901, 87 N. W. Rep., 557, holds:

"Where the incorporators of a mutual insurance company who were business men unlearned in the law, employed an attorney to draw their incorporation articles, and they signed the articles in the body of the instrument, and not at the end as required, and did not acknowledge the same, though

they immediately organized and began transacting business, the corporation will be deemed to exist *de facto* and a member having dealt with it will be estopped from denying its corporate existence."

Fizer *vs.* Miss. & Tenn. R. R. Co., 32 Miss., 360, and Barrington *vs.* Miss. Cent. R. R., 32 Miss., 370, have, as will be readily perceived, no bearing upon the questions in issue.

We have already cited three cases decided by the supreme court of Mississippi, and they sustain the proposition for which we contend.

Lake Ontario, Auburn & N. Y. R. R. Co. *vs.* Mason, 16 N. Y., page 451, is not an authority for the appellee, and Burns *et al. vs.* Beck *et al.*, Sup. Ct. of Ga., 10 N. E. Rep., page 121, not only fails to support the contention of appellees, but is a direct authority for appellant.

Empire Mills *vs.* Alston Grocery Co. *et al.*, 12 L. R. A., 366, holds:

"The stockholders are liable as partners on contracts of a corporation which they have undertaken to form for a certain business, under the laws of another State, solely because a corporation for such business could not be legally organized in the State where it is to be carried on."

The court said, quoting from Morawetz on Corporations:

"To obtain a charter for the purpose of evading the laws of a foreign State, under cover of the rule of comity, would be a fraud upon the State granting the charter; and to attempt to act under such charter in the foreign State would be a fraud upon the latter."

This is a doctrine not involved in any manner in this record, and the citation is without relevancy.

Jones *vs.* Aspen Hardware Co., 29 L. R. A., 143, is also without application. The court held:

"Neither a *de jure* corporation nor a *de facto* corporation can exist where the articles are not filed in the office of the Secretary of State and the fee therefor paid as required by

Session Laws 1887, p. 406, *which expressly prohibits the exercise of any corporate powers until this is done.*" (Italics ours.)

The court enunciates the following principles:

"A *de facto* corporation can never be recognized in violation of a positive law. To recognize the defendant as a *de facto* corporation would, as we have stated, be in direct conflict with the express language of the act, which declares that without the payment of the fee the corporation shall have no corporate power."

The court further said:

"One object of this statute is to restrict the organization of 'wild-cat' corporations, it being supposed that the increased fee required by the act would, in a measure at least, prevent the over-capitalization of companies. The legislature being of the opinion that this purpose would be advanced by requiring the fee to be paid as a condition precedent to the exercise of any corporate powers, it is the duty of the courts to give effect to this intent as the same is manifest from the plain language of the act."

This, therefore, presents solely a question of public policy, which the courts will always enforce, and has no resemblance to the case at bar, and does not involve the doctrine of estoppel.

Maryland Tube and Iron Works *vs.* West End Imp. Co., 39 L. R. A., 810, also involved the construction of the laws of the State of Maryland. The court held:

"Lack of corporate existence of the plaintiff suing as a corporation can be set up to defeat the action of the defendant, when this is based on the failure of the plaintiff to pay the bonus tax proposed by Acts 1890, chap. 536, under which such non-payment prevents the attempted corporation from having or exercising any corporate powers."

The court further said:

"To hold that the corporation had a right to sue would strike with absolute nullity the plain and imperative lan.

guage of sec. 88 F, which declares that no such corporation shall have or exercise any corporation powers until such bonus is paid."

This, therefore, is another rule of public policy, and the court simply gave it effect in its construction of the statutes.

The Maryland case and the Colorado case, based on statutes which deny the corporation the right to *use any of its powers* (which, of course, is not the case here), are in harmony and maintain a rule expressly declared by the statute, and can have no reference, in our opinion, to a corporation which is created a corporation by the very first section of its charter, and simply failed to pay in the capital stock subscribed at the beginning of its business, under a statute where there is no penalty for violating the provisions of the statute, and no declaration that an act done in violation of the statute is illegal and void. Besides, the later case of Hammond *vs.* Strauss, 53 Maryland, page 1, already cited, is a direct authority for the petitioner.

The Entire Case Before the Court.

The writ of *certiorari* granted by the court in this case brings up the whole record, and the court has the power to dispose of the entire case—not only the question of jurisdiction, which was passed upon by the circuit court of appeals, but also the other questions involved.

This court "may require the whole record to be sent up for its consideration, and thereby decide the whole matter in controversy."

United States *vs.* Jahn, 155 U. S., 112–113.

"But while the court of appeals may have been limited on the second appeal to questions arising upon the amount of damages, no such limitation applies to this court, when, in the exercise of its supervisory jurisdiction, it issues a writ

of certiorari to bring up the whole record. Upon such writ the entire case is before us for examination."

Panama R. R. Co. *vs.* McNair Shipping Co., 166 U. S., 280–284.

"The Supreme Court has power under act of March 13, 1891, to require any case pending in the circuit court of appeals regardless of status of case in that court to be certified to it."

Forsythe *vs.* Hammond, 166 U. S., 506–513.

We earnestly request that this honorable court exercise its discretion to dispose of the entire case, for we submit that the rights of the petitioner are plain, and through the delays of the law the petitioner has been for more than four years deprived of its money. The debt was due in 1900. The case was first tried in June, 1902, in the circuit court for the western district of North Carolina. It was argued before the circuit court of appeals in November, 1902, and after holding the case for a year that court ordered a reargument, and the case was again argued in November, 1903. The opinion was filed in the circuit court of appeals in February, 1904, and a few weeks thereafter it was brought to this court by writ of certiorari. We respectfully submit that this long delay should appeal most strongly to this honorable court and should cause it to exercise its discretion to hear and determine all the questions involved and thus make an end of the long-drawn-out controversy.

Assuming, then, that the court will hear the entire case, we will proceed to discuss the questions involved other than that of jurisdiction; and we desire, in the first place, to refer to

Judge Boyd's Opinion.

After hearing this case in the circuit court, Judge Boyd wrote an opinion, which will be found in the record, on page 184. After disposing of the question of jurisdiction, Judge Boyd discussed the respondent's defense to the merits, and he held that there was no evidence sufficient to go to the jury, and he directed a verdict in favor of the petitioner. The reasons which he gave for this course are cogent and, we submit, are unanswerable. The burden of proof was on the defendant to sustain its affirmative pleas of settlement and payment, and Judge Boyd ruled that defendant had not sustained its pleas by competent evidence sufficient reasonably to warrant the jury in finding for defendant. The judge who tried the case was in position to see the demeanor of the witnesses on the stand and to determine how far the jury was warranted in finding a verdict upon the testimony offered. If the main witness for the Wells Company, John T. Wells, was to be believed, then, apart from all the points of law in the case, the respondent had absolutely no ground upon which its defense could be sustained, even though every word which the witness for the respondent testified to was believed. Judge Boyd was likewise in position to observe the witness for the respondent, John F. Love, and he could determine how far the jury was warranted in giving credence to his vacillating and wholly unsatisfactory testimony.

This court has held too often to need citations that a Federal judge in presiding at the trial of a cause is there to see that substantial justice is done, and that a Federal appellate court should be slow to overrule the decision of the trial judge when he holds that the case is one in which the ends of justice require that he should direct a verdict.

An examination into the merits of this case will show conclusively the justice of Judge Boyd's decision.

Contentions of Defendant.

The court will observe that this is an action brought to recover a large sum of money alleged to be due by the respondent to the petitioner for cotton sold and delivered. The attention of the court is called to the fact that the respondent in its answer admits that the cotton was sold, as alleged in the complaint. At the beginning of the trial, when his honor Judge Boyd called on the parties to state their contentions (see bottom of page 15), the defendant's counsel admitted that the cotton had been received and that the charges for the same were correct, and the only pleas of the respondent were that the plaintiff was not a corporation, and that there had been paid upon this claim and upon the claim of the plaintiff against the Avon Mills the sum of fifty thousand dollars ($50,000), and the respondent admitted owing the balance to the petitioner, so that subject to the credit of fifty thousand dollars ($50,000) the respondent and the Avon Mills now admit owing the balance of the purchase-money, with interest on each invoice from thirty days after date of invoice, exactly as it is claimed in the complaint.

The answer of the respondent (R., pp. 7, 8) avers that at the time of the purchase of the cotton by the respondent W. L. Wells, who represented the petitioner in the sale, in order to secure the sale of said cotton to the defendant, agreed with the said John F. Love that if he, as agent of the defendant, would agree to purchase cotton from the said Wells or from the partnership or corporation represented by him a portion of the purchase-money due for the said cotton might be invested in the stock of another corporation about to be organized known as the Loray mills, and the defendant then alleges that pursuant to said agreement it had three settlements with the petitioner, one on August 3, 1900, and a second settlement on December 3, 1900, and lastly in January, 1901.

Attention is here called to the fact that the answer of the defendant (R., pp. 8–9) distinctly alleges that the agreement between W. L. Wells and John Love was that—

"a portion of the purchase-money due for said cotton might be invested in the stock of the said proposed manufacturing plant which was known as the Loray mills."

The only interpretation that can be put upon this language is that the defendant was here alleging that the Wells Company had agreed to have the money due for the cotton invested in stock of another corporation, and that this stock was to belong to the Wells Company. The defendant further alleges that afterwards settlements were made "in *strict* accordance with the terms of the contract." We find, however, that upon the trial the defendant wholly abandoned any effort to show that the Wells Company had agreed that the money due for its cotton might be invested in stock of the Loray mills, and the defense was shifted into an effort to show that the company had ratified an act whereby the purchase-money of cotton was diverted into the payment of an individual subscription, to the amount of fifty thousand dollars ($50,000), made by W. L. Wells for his own benefit.

It developed on the trial that these alleged settlements were not settlements at all, and the most that could be made out of it for the respondent was that there was an attempt on the part of John F. Love, who was treasurer of the respondent, and also of the Avon mills, and who was chief promoter of the Loray mills, to apply the purchase-money of cotton bought from the petitioner towards a subscription made by W. L. Wells to the Loray mills. We will later on discuss these alleged settlements of August 3 and December 3, 1900, and will merely now call the attention of the court to the fact that as to the alleged settlement made in January, 1901, the witness Love distinctly admitted that there was no such settlement and no foundation for this allegation in the answer which was sworn to by him (R., p. 97).

It was contended by the respondent that John F. Love had made certain entries on his books, and upon these respondent relied, in large measure, to show the alleged payments contended for; but it will develop upon an examination of the testimony that these entries upon the books by John F. Love were a sham and a subterfuge, and made merely to enable him to "assist the Loray mills" (R., p. 81), which organization had a struggle for its existence from the very start, and Love was diverting all the funds in his reach to endeavor to save it from financial ruin—a thing which he failed to accomplish, as it went into insolvency at its very first meeting (R., pp. 153–170).

Contentions of Petitioner.

The main contentions of the petitioner in the case are as follows:

(1.) That the vague, indefinite, and wholly unsatisfactory testimony of John F. Love as to an equally vague and indefinite agreement on the part of W. L. Wells to apply a portion of the purchase-money of cotton in payment of stock of the Loray mills is directly contradicted by the letters which were written after the alleged conversations and which constitute the only written agreement between the parties, and which are therefore the only binding agreement in reference thereto. Upon the strength of these letters and other evidence, we contend that no such agreement was ever entered into by W. L. Wells, even if he had authority to bind the petitioner by any such contract.

(2.) But it is apparent from all the evidence that W. L. Wells had no authority to bind the petitioner by any such contract. It is not contended that he had any such actual or express authority, and it is plain that he had no implied authority from the petitioner to accept anything but money

in payment of cotton. No one could presume that he had any such authority, because it was not only extraordinary and out of the usual course of business, but was *ultra vires* of the petitioner.

(3.) Even if W. L. Wells made such an agreement, yet it is apparent that it was only made for his own individual benefit, and it could not be presumed that he was authorized to have the money of his principal applied in payment of his own individual stock subscription to the Loray mills.

(4.) There has been no ratification of any agreement made by W. L. Wells, because (*a*) there are no facts from which ratification could be inferred; (*b*) the Wells Company did not have knowledge necessary to constitute ratification; (*c*) the contract could only have been ratified by the party who had authority to make it; (*d*) bringing suit on the contract was not a ratification, because none of the cotton in controversy was sold under the terms of the contract set up by respondent, and, besides, it was impossible for the Wells Company to repudiate the contract and save itself harmless; (*e*) the contract was *ultra vires* of plaintiff corporation, and therefore incapable of ratification.

The foregoing are the principal contentions made by the petitioner and will be discussed at length in that part of the brief which follows.

How Case Was Tried in Circuit Court.

In order to enable the court to get a clear idea of the merits of the case we desire to show how the case was tried in the circuit court.

The petitioner, who is plaintiff in the action, after introducing its charter, put upon the witness stand J. T. Wells (R., p. 16), who testified as to the various sales of cotton and the

payments made, and testified that the balance was due exactly as alleged in the complaint. He denied absolutely all knowledge of any agreement made by W. L. Wells as to the application of the purchase-money to the payment of stock of the Loray mills. He was the treasurer of the petitioner and was the officer in charge of its affairs at the home office. This testimony of John T. Wells, together with admissions of respondent, made out the case, and the respondent then placed upon the witness stand John F. Love (R., p. 65), who was the secretary and treasurer and general manager of the respondent, and also of the Avon mills. The respondent undertook to show by Love the agreement between him and W. L. Wells and other transactions and letters which passed between the parties, which, according to respondent's contention, tended to support the pleas set up in the answer.

By reference to pages 111 and 112 of the Record it will appear that when the evidence was offered by respondent as to transactions between John F. Love and W. L. Wells in reference to the subscription to the stock of the Loray mills and the alleged agreement to allow the purchase-money of cotton to be applied in payment of the same, the petitioner objected to all this evidence, and his honor stated that he would admit the same *subject to the requirement that it should thereafter be shown in the course of the trial that W. L. Wells had authority from the petitioner to make the agreement, or that the same had been ratified by the petitioner.*

At the close of the testimony offered by respondent the petitioner stated (p. 112) that before introducing testimony in reply the petitioner would move the court that all the evidence which had been offered as to transactions between W. L. Wells and John F. Love in regard to the agreement, that part of the purchase-money of the cotton should be applied to the payment of the alleged subscription made by W. L. Wells to the stock of the Loray mills, be stricken out, for that the evidence of the respondent had closed and the respondent had failed to show any authority on the part of

W. L. Wells to agree that any part of the purchase-money should be applied to the payment of his subscription to stock in the Loray mills, and had failed to show any ratification of the same by the petitioner.

His honor thereupon stated that he would instruct the jury that the respondent had failed to offer any evidence from which the jury would be warranted in finding that W. L. Wells had authority to bind the petitioner by any agreement to apply any part of the purchase-money to the payment of his stock, and had failed to offer any evidence from which the jury would be warranted in finding that the petitioner had ratified any such act, and that upon the pleadings and the evidence in the case he would instruct the jury to find the issue in favor of the petitioner and render a verdict for the amount claimed in the complaint.

These statements will be verified by reference to page 112 of the Record, and we call attention to them for the reason that it is argued by the respondent that the failure on the part of the petitioner to put W. L. Wells and George Butterworth upon the witness stand was a circumstance from which the jury would be warranted to infer that they knew something which would support the contentions of the respondent. It is plain that the petitioner could not have put these witnesses upon the stand to reply to the testimony of respondent after Judge Boyd had ruled that respondent had not made out its pleas and that there was nothing to go to the jury. Therefore absolutely no inference prejudicial to the petitioner can be drawn from the fact that these witnesses were not put upon the witness stand.

Statement of Material Facts.

Having shown the court the contentions of the parties and also how the case was tried, we now desire to give a statement of the material facts in consecutive order:

The W. L. Wells Company, the petitioner, did business

with The Gastonia Cotton Manufacturing Company, the respondent, and with the Avon mills for three cotton seasons, beginning in the fall of 1898, and it may be noted here that a cotton season runs from the first of September of one year to April of the succeeding year (top of page 17).

W. L. Wells subscribed for five thousand dollars ($5,000) of the capital stock of the petitioner, and John T. Wells and George Butterworth for twenty-five hundred dollars ($2,500) each. John T. Wells was the treasurer and office man, while George Butterworth, the vice-president, bought cotton for the corporation, and W. L. Wells, the president, sold most of the cotton, though Butterworth sold cotton also (p. 38).

John F. Love was the treasurer and general manager, both of the respondent and also of the Avon mills, and he was the chief promoter of the new enterprise known as the Loray mills. He also owned a bank known as the Gastonia Banking Company. Upon the books of this bank were some very remarkable entries connected with these transactions which will be referred to later.

There was no dispute as to the dealings between the parties for the first season, 1898–1899, and all the cotton purchased by the respondent was paid for at the close of the season.

Cotton Season, 1899–1900.

In the fall of 1899 W. L. Wells visited Gastonia, and, according to Love's testimony (p. 66), Wells agreed to take ten thousand dollars ($10,000) of stock in the Loray mills, and stated that he might move to Charlotte, and, if so, would take fifty thousand dollars ($50,000) of stock, and in that event he was to be cotton-buyer for the Loray mills and for the respondent and the Avon mills, and he was to become vice-president of the Loray mills. That Love did not rely upon this as a subscription to the stock of the Loray mills is shown by his testimony on page 67 to the effect that Wells visited Gastonia on the 10th of May, 1900, when he agreed to take

stock, but "had not decided as to the amount." In fact, there seems to have been nothing definite reached until the letter written by W. L. Wells to Love on July 13, 1900 (p. 58), and in this letter Wells agreed to take ten thousand dollars ($10,000) of stock, with the possibility of increasing to twenty-five thousand dollars $25,000). Instead, however, of agreeing that Love might pay Wells' subscription out of the money due for cotton, Wells distinctly states in this very letter: "If you can possibly do so *please remit us balance on account, as we need it to settle up matters* which I should like to do before leaving next Wednesday." Here, then, is the evidence in writing both as to the subscription to the stock of the Loray mills and also upon the very question at issue in the case—that is, as to the right to apply the cotton money to the stock subscription. No one can doubt that if it had been Wells' understanding that the subscription to the Loray mills might be paid out of the purchase-money of cotton, he would in this letter have instructed Love to deduct the ten thousand dollars ($10,000).

That there was something said about using the money due for cotton in payment of stock subscription, and that Wells had *not* agreed to this, is apparent from the letter written by Wells to Love on May 18, 1900, a few days after his return from Gastonia to Vicksburg, in which he says (p. 122):

> "*Regarding the balance due us on last season's purchases I had rather not mix that up with anything else and would thank you to remit to cover this as soon as possible as it would facilitate me very much.*"

Here is as distinct a refusal as language could make it to permit the purchase-money of the cotton to be applied in payment of the stock subscription, and a distinct demand to have the entire amount remitted.

Indeed, it is worthy of note that during Love's testimony he gave the most unsatisfactory statement as to the alleged

agreement on the part of W. L. Wells, and by turning to page 67 of the Record the court will see how Love's counsel had to drag out of him, so to speak, the testimony in regard to the alleged agreement. Nowhere in the record can there be found any clear, explicit, and satisfactory statement on the part of Love as to exactly what was agreed to by Wells and as to the time and place when the agreement was made.

It will appear, therefore, that prior to the first day of August, 1900, Love had received numerous demands for the payment of the account in full, and particularly had received the letter of May 18, 1900 (p. 122), distinctly declining to have the accounts "mixed up" and requesting remittance in full, yet in the face of all this Love pretends that on July 31, 1900, he entered to the credit of the Loray mills on the books of the Gastonia Banking Company the sum of ten thousand dollars ($10,000) received from W. L. Wells (p. 140). It must be noted that this entry was made on the 31st of July and not on August 3, 1900, and yet this is the "settlement" which he refers to in his answer as having taken place on August 3, 1900 (p. 8), all of which goes to show the utter unreliability of his statements.

Love admits that he gave the Wells Company no notice of this entry on his books. About this time he sent a remittance which was sufficient to have paid all that was then due except ten thousand dollars ($10,000) and except also the interest which had not been paid on past-due invoices. It will be noted at the bottom of page 67 that the remittance which he did make was thirty-two hundred eighty-three and $\frac{13}{100}$ dollars ($3,283.13), covering invoices for sixty-four bales of cotton, and on the top of page 68 he testified that he got this invoice returned with the endorsement, "Paid August 3rd, 1900." The attention of the court is called to the fact that according to Love's own admissions he did not have a single statement of account from the Wells Company receipted in full, because he always remitted by invoices and had specific invoices marked paid (top of page 86).

It is not denied then but that during the entire month of August the Wells Company was in absolute ignorance of the fact that Love had attempted to transfer ten thousand dollars ($10,000) of its money in payment of W. L. Wells' subscription (bottom of page 88). The respondent contends, however, that notice was given to the Wells Company by the endorsement made by John F. Love on the letter written by the Wells Company on the 31st of August, 1900. This letter is found on pages 59 and 60, and the letter, together with the endorsement by John F. Love, is here produced in full:

"VICKSBURG, MISS., *August* 31, 1900.

"Mr. JOHN F. LOVE,
"*Treasurer, Gastonia, N. C.*

"DEAR SIR: Enclosed we beg to hand you a statement of your account to September 1st, showing balance due us of $12,691.67. May we ask that you remit us by return mail in full for this balance, and oblige,

"Yours very truly, W. L. WELLS CO."

(Endorsement by John F. Love.)

"$10,000.00 stock Loray mills.
" 2,691.67 interest.

"$12,691.67 balance.

"We want to see your Mr. W. L. Wells about it when he comes to see us.

"Yours, JOHN F. LOVE, *Treas.*"

EXHIBIT "D."

This letter with the endorsement made by John F. Love was returned to the Wells Company, and it is this fact that respondent relies upon more than anything else in this whole case to support its plea that the Wells Company ratified the act of Love in appropriating ten thousand dollars ($10,000) of its money to the payment of the subscription of

W. L. Wells. We wish, therefore, to put the court in possession of the material facts bearing upon this letter and the endorsement made by Love.

In the first place it will be noted that the letter with the endorsement made by John F. Love was returned to Vicksburg in the absence of W. L. Wells, who was expected in Gastonia about that time (p. 31). W. L. Wells did reach Gastonia in September, 1900, and Love admits that he said nothing whatever to W. L. Wells about this ten-thousand-dollar ($10,000) payment (p. 89).

The most important fact in regard to this letter is the testimony of John Wells, who swore positively that he took absolutely no notice of this endorsement of John Love, and that the document was filed away among the records of the Wells Company by a young man in the office (p. 31), and more particularly he testified positively (top of page 35) that he did not know what John Love's endorsement on this letter meant, and that he had never heard of any subscription to stock of the Loray mills and did not talk with W. L. Wells about the matter. If this testimony was to be believed by the jury, then the whole force of the respondent's contention fell to the ground, because it completely negatived the inference which respondent was seeking to draw, viz., that the Wells Company had accepted the payment and ratified the act of John Love in transferring ten thousand dollars ($10,000) of its money in payment of stock.

This testimony of John T. Wells therefore proves conclusively that he knew nothing about this appropriation of the company's money, and it also proves that George Butterworth, who was vice-president of the company and a member of the board of directors and whose affirmative assent to the proposition was absolutely necessary, was in Yazoo, Mississippi (bottom of page 35). Even if Love had sent a statement showing clearly and unmistakably that he had appropriated ten thousand dollars ($10,000) of the company's money to the payment of W. L. Wells' subscription, yet be-

fore this act of Love could have had any effect it would have been necessary that it be ratified by all of the members of the corporation, while here it is shown beyond question that two of the members, John T. Wells and George Butterworth, who were treasurer and vice-president respectively and both members of the board of directors, did not assent to it.

But referring again to the endorsement itself it will be noted by the court that it could not be construed into notice that Love had already applied $10,000 to the stock subscription, and the most that could be made out of it was that John Love wished to see W. L. Wells about "it" when he reached Gastonia. Love pretended when on the witness stand that the "it" which he wished to see about was the interest (p. 18); but he admitted that when W. L. Wells did go to Gastonia he did not speak to him about the interest (top of page 89), and, in fact, there never was any dispute about the interest account. This will appear by reference to pages 20 and 77, and more particularly by reference to the admissions in the answer and the admissions of counsel found at top of page 16. The complaint set forth that interest was due on all invoices after thirty days from date, and this was admitted to be true. Love telegraphed the Wells Company on September 12 (p. 125) that he was anxious to see W. L. Wells and arrange "business matters."

From all these circumstances it not only appears that the Wells Company did not understand by this endorsement made by Love on the letter of August 31 that he was claiming the credit of $10,000, but the facts and circumstances also show that John Love himself did not understand that he was claiming this as a credit, but merely that he was expressing a desire to talk to W. L. Wells about "it." As showing conclusively that Love did not consider that the $10,000 credit had been allowed in consequence of the endorsement on this letter of August 31, it is only necessary at this point to refer to Love's letter of February 2,

1901 (p. 62), in which he requests W. L. Wells to have the account of the mills *credited at that date with the* $50,000. *It is too plain for argument that if Love had supposed that the Wells Company had allowed the credit in August*, 1900, *of* $10,000 *he would have asked in the letter of February* 2, 1901, *that the account be credited with* $40,000 *instead of* $50,000.

The respondent's sole reliance in regard to this ten-thousand-dollar ($10,000) credit is that after the letter of August 31, with the endorsement of John F. Love upon it, went back to the Wells Company this company never made any specific demand for the balance due for the season 1899–1900. In reference to this it must be said that the Wells Company had exhausted itself in dunning Love prior to that time and a new season was just opening up, and John Wells testified that he left the balance due on the books for the season 1899–1900 and opened up a new account for the coming season of 1900–1901 (p. 35). The respondent got in debt during the fall of 1900, and frequent demands were made for money from that time on during the fall and winter of 1900 (p. 130), and payments were being made (p. 133), and it certainly could make no difference that a specific demand was not made for the amount due on August 31, 1900.

But again it will be noted that the whole amount of the balance claimed in the letter of August 31, 1900, was twelve thousand six hundred ninety-one and $\frac{67}{100}$ dollars ($12,691.67). By tracing this balance back through the accounts which appear in the record it will be found that twenty-six hundred ninety-one and $\frac{67}{100}$ dollars ($2,691.67) was interest. We have already shown that there never was any dispute about the interest account, and the attorneys admitted (pp. 15–16) that the interest was due exactly as it was claimed in the complaint, and it was there claimed to be due thirty days after date of each invoice. It must be conceded, then, that at the time Love wrote this endorsement upon the letter of the 31st of August, upon which so much stress is now laid, he knew that the interest amounting to

this large sum was still due, and this interest has never been paid up to this present time. Failure to demand this interest certainly does not show that it is not due, and by the same token a failure to demand the entire sum, including the interest, is no evidence that the Wells Company did not continue to claim the full amount. But apart from all this, as we have already shown, the failure to demand payment was only a circumstance from which unexplained the jury might have inferred that the Wells Company had allowed the credit of ten thousand dollars, but no judge could have permitted the jury to draw such an inference in the face of the full and clear explanation made by John T. Wells, who testified positively that no such credit was allowed and that the company never had treated this endorsement made by John F. Love on the letter of August 31, 1900, as a claim of a credit to the amount of ten thousand dollars.

As throwing further light upon the alleged settlement of August 3, 1900, and as showing conclusively that W. L. Wells himself knew nothing about any such appropriation of the company's money to the payment of any subscription which he had made, we find that in the letter of October 4, 1900, W. L. Wells wrote to Love making the fifty-thousand-dollar ($50,000) subscription, thereby clearly indicating that he understood that the subscription had been left open, and that nothing at all had been done in regard to it; but in this letter he tells Love that he wants the payment of his entire subscription of fifty thousand dollars ($50,000) "to come in on the last payment." No reasonable person can read this letter without reaching the conclusion that W. L. Wells knew absolutely nothing of Love's prior attempt to appropriate ten thousand dollars of Wells Company's money to the payment of any prior stock subscription.

COTTON SEASON 1900–1901.

We have endeavored in the foregoing part of this brief to place before the court in consecutive order a statement of the most material facts bearing upon the transactions connected with the season of 1899–1900, and more particularly the facts bearing upon the alleged settlement made in August, 1900. We now wish to call attention to the main facts connected with the season of 1900–1901 as bearing particularly upon the alleged settlement of December, 1900.

In September, 1900, W. L. Wells visited Gastonia on his way from Canada (p. 68), and the subject of the subscription to the stock of the Loray mills was still undecided. Love was urging Wells to come to some final decision, and hence, after the return of Wells to his home in Vicksburg, he wrote the letter of October 4, 1900 (p. 62), which is here copied in full:

"VICKSBURG, MISS., *October* 4, 1900.

"Mr. JOHN F. LOVE, *Gastonia.*

"DEAR MR. LOVE: In reference to the Loray matter, I have arranged to take the $50,000.00 stock, but want you, as stated when there, to let this come in on the last payment, say about 1st January next. This will enable me to clean up my deal I wrote you about last spring, and besides for the next 90 S/s, I will be crowded somewhat for money to carry on my business. I am going to make a change in my present firm after this season, so don't want my arrangements with you and the Loray known to them, hence in writing me about this please mark your letters '*Personal.*'

"Please keep me posted about how the Loray is progressing.

"With regards to Mr. Gray, I am,

"Yours truly,

W. L. WELLS.

"P. S.—When is your idea to organize?"

In regard to this letter, it will be noted, in the first place, as already stated, that W. L. Wells certainly had no idea

that any of his company's money had already been used in paying his stock subscription, and he is evidently making what he conceives to be a subscription which covers the entire amount he was to take of this stock, and he is making request that "this come in on last payment," showing that he knew of no prior payment and was making his own arrangements to pay the entire $50,000 out of his own funds. But the most important thing in connection with this letter is that Wells stated that he did not want his arrangements known to his associates in business, and asked that all letters in regard to the Loray stock be marked "*Personal.*" John Love testified that he complied with this request, and that after that date all letters about the Loray mills were marked "Personal" (top of page 91), and John T. Wells also testified that all these letters came to the office marked "Personal," and that he did not open them, nor did he know anything of their contents, and particularly that he did not know anything about this letter of October 4 (p. 35).

Love pretended in his testimony to understand that part of this letter which said "let this come in on the last payment, say about 1st of January next," to mean the last payment on the cotton, but a moment's reflection will disclose the absurdity of this claim. There were no last payments on the cotton, and in point of fact there were only two invoices, as shown on page 5 of the Record, which became due after the 1st of January, so that if Love's contention was correct he would only have been authorized to take out the two invoices that were due about the 1st of January and which amounted to only about $6,500; and yet we find that he did not wait until the 1st of January, but pretended that he took the whole amount out on the 3d of December. What Wells plainly meant was that he desired his payment to come in on the last payments of the stock. Love had told him that the stock was to be paid in installments of 10 per cent. per month, and under that arrangement the last payment on the stock would have been due about the 1st of January, 1900.

It is now contended by Love that on the occasion of the visit of W. L. Wells to him in September, 1900, there was some sort of an arrangement which Love understood to be an agreement that the money due for cotton should be applied to the stock subscription of W. L. Wells; but, as directly contradicting this testimony of Love, we find a letter written by W. L. Wells to Love on October 5, 1900 (p. 126), in which Wells says, "*By the way, when there we failed to talk anything about how you wanted to pay for this season's purchases.*" Nothing could be more explicit than this as a contradiction of Love's testimony to the effect that Wells had agreed that the season's purchases should be paid for by a stock subscription to the Loray mills.

On page 127 is found Love's reply to Wells' letter of October 5, and in this letter Love says, "As to payments on cotton we wish to remit you promptly for our immediate wants and we are making arrangements with National Surety Company to get the money when we commence storing cotton." Here is a distinct written agreement that Love would "*remit*" for the cotton purchased, and if there ever had been any verbal agreement to the contrary this letter would have annulled it.

On page 130 is found a letter which Wells wrote Love under date of October 31, 1900, notifying him of shipment of one hundred and fifty bales of cotton and saying, "I suppose you will want us to carry this cotton until it arrives when you will reimburse us through your arrangements with the National Surety Company. Please let us know definitely about this that we may know just what to say to our bank about it." To this letter Love replied, on November 3, 1900 (p. 130): "We are arranging with the National Surety Company to get all the money you want and as you suggest you can arrange with your bank accordingly."

It may be here noted that Wells did arrange with his bank and secured large credit from the bank on the faith of Love's statement, and there is at this very time due to the

bank more than twenty-seven thousand dollars ($27,000), not including interest (p. 37), and if the plea of the defendant is sustained in this case there will not be sufficient assets of the company out of which to pay the bank the debt contracted on the faith of Love's statement.

On November 13, 1900, Wells Company wrote Love (p. 132): "Hope you have perfected your arrangements with the National Company and will be able to *remit us promptly as the cotton is received*, as it runs into money at a terrible rate and it does not take long to get in very bad shape with our bank." To this Love replied, on November 17, 1900 (p. 132): "On money matters we have perfected our arrangements and we were looking for a check today but it has failed to come and we expect it now the first of the week when we will make you a remittance."

We earnestly submit that no one can read this correspondence when taken in connection with the unsatisfactory testimony of John F. Love and reach any other conclusion but that there had been between him and W. L. Wells absolutely no agreement or arrangement by which the company's money was to be applied in payment of W. L. Wells' stock subscription. The affairs of John Love were at this time getting in desperate shape, and particularly the affairs of the Loray mills. He was going ahead attempting to build this million-dollar plant without ever having had any organization whatever of the Loray Mills corporation, and he was in desperate need of funds to carry on this stupendous enterprise. He pretends, therefore, to have gone to his books and made additional entries, which will be found on pages 140 and 141. He first put down that the W. L. Wells Company had deposited in the Gastonia Banking Company $40,688.08, and then he entered that the Loray mills had deposited with the Gastonia Banking Company $10,000, which it had received from W. L. Wells individually. This made it appear on the books of the Avon and Gastonia mills that their accounts with W. L. Wells Company were square (bottom of page 92),

and it enabled Love to use these funds to "assist Loray" (top of page 97).

These book entries of December 3, 1900, constitute the main settlement which is set up in the answer of the defendant. It is admitted by Love that he gave the Wells Company no notice whatever of this appropriation of the company's money (p. 94), and yet this is called a settlement!

According to Love's contention there was nothing due from his mills to the Wells Company after this so-called settlement of December 3, and yet we find that on December 18, 1900, the Wells Company wrote Love a letter, sending invoices, and saying (p. 134), "We presume our recent shipments are in, and if so please remit as soon as possible as we stand very much in need of same." To this letter Love made no reply, as he undoubtedly would have done if he had supposed for a moment that the accounts were settled on his books.

Again, on January 2, the Wells Company wrote him (p. 37):

"By the way, what about paying for some cotton? Certainly most if not all of our shipments since the middle of November have arrived and we see no reason why we should not be paid according to the understanding. We don't call to mind an instance in our experience where we have worked harder to secure a lot of cotton than we did in these purchases for you and of course we feel that *we are entitled to as prompt a reimbursement as it is possible for you to make.*"

Now, it would seem that if there was a scintilla of good faith in Love's contention he would have replied to this urgent letter and he would have given the Wells Company a "*reason*" why he had not remitted and would have stated that he did not owe them, and that the reason why he had not remitted was that forty thousand dollars ($40,000) of the money had been turned over to the Loray mills in accordance with an understanding that he had had with W. L.

Wells. He admits, however, that he made no reply to this letter.

Following this, we find that on January 7 the Wells Company wired Love (p. 118): "When can we expect a remittance? We are disappointed at not receiving a remittance last week." Again, on January 10, the Wells Company wired him: "Have received no reply to our telegram of the 7th inst. Please give it attention. Reply by wire so that message will reach us tomorrow. It is important for us to know exactly what we can depend upon. Particulars by mail." On same day the company wrote him (p. 119), urging him to remit, etc. To all of these Love made no reply. It is apparent that it had never occurred to him to contend that the book entries which he made on the 3d of December amounted to a settlement. He knew that the company had not authorized it, and he did not have the boldness to say anything about it. The company dunned him again by wire on January 31, 1901 (p. 138). His paltry explanation of all this will be found on page 95 of the Record and is but in line with all the balance of his testimony. It seems to have occurred to him at this juncture for the first time to request of W. L. Wells that he would have the house credit the account with the $50,000, and then for the first time he gave notice to W. L. Wells himself of his having paid in the $50,000, and he seems to have determined to make the effort to have W. L. Wells arrange it with his house in some way so that the money which he had appropriated to the use of the Loray mills might stand. It will be noted in this letter which we are about to refer to and upon which respondent relies so much that Love does not tell Wells that he had already balanced the account on his books by appropriating $10,000 on the 3d of August, 1900, and $40,000 on the 3d of December, 1900, but he is making the request of Wells that he would have his house then—that is, upon receipt of that letter—credit the mills with the full sum of $50,000.

This brings us to the letter of Love to Wells under date of February 2, 1901 (p. 62), in which Love, after mentioning matters in connection with the building of the Loray mills, says:

"I have paid in your fifty thousand dollars ($50,000) and can send you certificate at any time in any way you suggest and before issuing them will await your advice. Please have our account with your house credited with the amount."

This letter, according to the testimony of John T. Wells (p. 35), came marked "Personal," and he never knew anything of its contents. Love also testified that he marked the letter "Personal." He says (top of page 91), "I think all letters after October 1st, 1900, were marked 'Personal.'" We have it fixed, then, by all the testimony that this letter upon which the defendant now relies so much, and which it contends gave the Wells Company full notice necessary to constitute ratification, was marked "Personal" for the express purpose of keeping the Wells Company from finding out anything about it.

At this point we wish to explain certain testimony of John T. Wells, which, if taken by itself and unexplained, might produce an erroneous impression. On page 25 it will be found that on cross-examination counsel for the defendant, referring to a check which had been sent by Love to the Wells Company, asked the witness if the check did not pay all the invoices that were then due and some that were not due, and to this the witness replied that it paid all invoices of the Gastonia Manufacturing Company up to and including November 5, 1900, and all of the Avon mills up to and including November 2, 1900. From this testimony it has been argued that John T. Wells admitted that the books had been balanced, but by reference to page 24 it will be seen that counsel were cross-examining John T. Wells in regard to specific invoices, and finally asked the question

whether the specific invoices referred to by counsel did not when added up amount to $40,357.59. A check for $25,000 had already been sent and Love inclosed a check for $15,357.59, and these two remittances together made $40,357.59 and covered *specific invoices, and it was specific invoices which were marked paid.* Love admitted that he did not have a single account or statement from the Wells Company which was marked paid in full (top of page 86).

But the respondent relies upon the fact that after the letter of February 2, 1901, went to the Wells Company there were no more demands until August, 1901. The most that can be made of this is that the silence of the company might unexplained have afforded an inference that the company knew something about the matter if it had not been affirmatively shown that the company knew nothing about this letter. The failure to continue "dunning" Love was fully explained by John T. Wells, who testified in the first place that he never knew anything about the letter of February 2, 1901 (p. 35), and he further testified that he asked W. L. Wells several times about the account, and W. L. Wells stated that Love was "hard up" and asked to let the matter stand (bottom of page 36). If this testimony of John T. Wells was to be believed (and Judge Boyd seems to have thought it worthy of credence), then no jury should have been permitted to find that the company did know about the letter of February 2, 1901, and had assented to the diversion of its funds to the payment of the stock subscription.

Moreover, it appeared from the testimony (p. 36) that these mills had owed the Wells Company large amounts before and the Wells Company had exhausted itself in "dunning" Love's mills. It is now admitted that a large sum—to wit, over $12,000—was due all during the spring of 1901, and if no demand was made for the payment of the sum which Love admits now was due, then it is difficult to see how a failure to make demand could be used as an argument against the Wells Company; and, finally, when demand

was made in August, 1901 (p. 57), there was no attempt on the part of Love to claim that $50,000 had already been paid, and this he never did until a short time before this action was brought and the attorney for the Wells Company was threatening him with suit (p. 101).

Love's Fictitious Book Entries.

The respondent in this case relies very greatly upon the entries which Love testified that he made on his books by which on the 3d of August, 1900, and on the 3d of December, 1900, he entered debits against the Wells Company of $10,000 and $40,000, respectively, both of them having been made without the knowledge or consent of the Wells Company. In order to show the hollowness of this claim it is only necessary to advert to Love's methods of business. An examination into these methods will show that he was in the most desperate financial straits and these entries were made for the purpose of having his condition show up better on the books of the various enterprises which he managed. The record will disclose that, although Love was being dunned for the money after the alleged book entries were made, yet he never at any time notified the Wells Company that he had made such entries or claimed such credits. We have already alluded to the fact that not until a few days before this action was commenced, in October, 1901, did Love ever even suggest the right to apply the purchase-money of the cotton to the stock subscriptions, and this suggestion was made to the attorney of the Wells Company when he threatened suit, and the only explanation that Love could make of it was that, although that was the first time he had mentioned the matter, yet *he had it in his mind all the time!* (p. 101).

As throwing light upon the situation, let us examine into Love's financial condition. He had in the fall of 1899 projected a stupendous enterprise, viz., the building of a

million-dollar mill. He bought the land and began the erection of it several months before he had even obtained the charter. The Loray was chartered on February 19, 1900, but was not organized until July 8, 1901, one year and nearly five months after it was chartered, and as soon as it was organized it went into liquidation as insolvent.

The first meeting of the stockholders of the Loray was held July 8, 1901 (p. 142). On July 11, 1901, three days after the first meeting, the directors passed a resolution (p. 153) to the effect that it was best to dissolve the corporation. The reason of this action of the board is disclosed by the report of the officers (p. 156) made to the stockholders, setting forth what they term the "crisis in the affairs of the company." This report shows the company's utter insolvency, and at the meeting of the stockholders on August 12, 1901, a resolution was passed (pp. 168 and 169) declaring "that the affairs of the corporation are in such condition, as appears by the report of the president and treasurer, *that a dissolution thereof seems necessary.*" Prior to this time Love had been managing alone the affairs of the Loray mills *without any authority from any one*, and its ruinous financial condition was due solely to his bad management.

The point we wish to emphasize is that Love had undertaken this stupendous enterprise without any adequate capital, and all during the erection of the mill before the organization of the corporation he was desperately pressed for funds. He was proposing to use the money which the sheriff of the county deposited in his bank from taxes, and also the proceeds of sale of town bonds which he admitted did not belong to him (pp. 75 and 118). This desperate financial condition furnished the motive for his most extraordinary juggling with all the assets that came within his reach.

As early as December 18, 1899, we find Love (p. 76) taking $13,000 which the Ozark mills owed the Wells Company and putting it in the bank, of which he was the exclusive

owner, and holding it until February 7, 1901, although the Wells Company was calling for the money.

But that was a small matter compared with his subsequent acts. In March, 1900 (p. 77), he transferred, without any authority whatever and without the knowledge of the Wells Company, all of the funds, amounting to $26,000, due Wells Company by the Gastonia mills, and placed it to the credit of W. L. Wells Company in his bank, and thus balanced the account of the Gastonia mills with the Wells Company, so that it was made to appear on the books that the Gastonia mills had paid the Wells Company all it owed.

On page 78 he testified:

"I charged them with $26,000 and closed their account and transferred the difference to the books of the Gastonia Banking Company."

He testified (p. 89) that he did precisely the same thing with the funds that the Avon mills owed the Wells Company, so that in March, 1900, he was holding the enormous sum of $51,637.34 (p. 80) which these two mills owed the Wells Company. This amount had been passed to the credit of the Wells Company on the books of Love's bank without the knowledge or consent of the Wells Company, and was held for several months, although the Wells Company was calling for what was due them.

On pages 78 and 81 of the Record will be found his paltry attempt to explain his conduct. He claimed that he did it "for convenience," and that he was awaiting Love's decision as to the stock. But that this contention was an afterthought is shown by the fact that when he received Wells' letter of May 18, 1900 (pp. 21–22), asking him not to "mix up" this account with anything else, but to remit it at once, Love continued to hold a large part of these funds, and, notwithstanding the letter of June 4, 1900 (p. 122), demanding that he remit and referring to his agreement to remit promptly, Love continued to hold a large part of the funds.

On June 19, 1900, Love wrote (p. 123) making a remittance, and stating that money was *scarce*, and that he would remit more soon "*if I am not too short.*" When he wrote this letter, on June 19, the accounts of the Avon and Gastonia had been balanced on his books for several months, and the funds had been put in his bank to the credit of the Wells Company. Finally, when Wells, on July 13, 1900, wrote (p. 57) agreeing to take the $10,000 and calling on Love to pay the balance he owed, he still held the funds.

But let us go further. In December, 1900, he again transferred funds amounting to $40,000 to the credit of the Wells Company in his bank, although he says the accounts were not due. Why did he do this? He explains it himself. On the bottom of page 92 he admitted that these entries on the books showed the stockholders of the mills that the accounts with Wells' Company had been paid. This money he admitted (p. 81) he kept in his bank to use. But more significant than all is his statement on page 97 that "the Avon and Gastonia mills anticipated payments *in order to assist the Loray mills*," and that he had already paid the money over to the Loray.

In further illustration that these entries were not *bona fide* let us take a letter written by the Wells Company to Love on December 18, 1900 (p. 134), where the company says, "We presume our recent shipments are now in and if so please remit as soon as possible as we stand very much in need of same." Love now contends that when he received this letter of December 18 he did not owe the Wells Company a single dollar, because he claims that on December 3, 1900, he had made application of the funds and had balanced the account and none of the invoices had become due between December 3 and December 18. Notwithstanding this fact Love made no reply to the letter of December 18 and did not set up the claim which he now makes that the account had already been settled by the payment of the stock subscription. Again, on January 2, 1901, the Wells

Company wrote a letter (p. 137) again calling for money from Love and referring to the shipments made since the middle of November, and saying, "We see no reason why we should not be paid according to the understanding." To this letter Love made no reply. The Wells Company went so far as to send a dun twice by telegram, on January 7, 1901 (p. 118), and on January 31, 1901 (p. 138). During all this time never a word from Love as to the forty-thousand-dollar ($40,000) entry on his books, and in fact he expressly admits (p. 94) that he did not give the company any notice whatever that he had charged up this forty thousand dollars ($40,000) against the account of the Wells Company.

During all the time that Love was paying these funds over to "assist the Loray" the Loray mills had not been organized, and there was no one who could have lawfully received funds for the Loray mills.

Another most pertinent fact, already alluded to, showing that Love was not claiming the right to make these credits is that when he wrote the letter of February 2, 1901 (p. 62), notifying Wells that he had paid in the $50,000, he requested Wells to have his house credit their accounts with the amount. If he had considered that the credits which he had already made on August 3, 1900, and on December 3, 1900, were *bona fide*, no one can doubt but that he would have asked that those amounts be credited as of the dates when they were paid, because it would have made a difference in interest of nearly $800 to have had the sums credited in August and December, 1900, rather than to have had the whole sum of $50,000 credited as of the date of the letter of February 2, 1901. In this letter he merely requests Wells to arrange the credit, and he does not once put it as a matter of right, nor does he say that he had entered any credits himself. He was evidently awaiting permission to do so.

This letter of February 2, 1901, in which Love makes the request that Wells would have his house credit the fifty thousand dollars ($50,000), also shows conclusively that Love did not understand that his endorsement on the letter of August 3, 1900, had been taken as a credit of ten thousand dollars ($10,000), because if ten thousand dollars ($10,000) had been credited on August 3, 1900, then Love would have requested a credit of only forty thousand dollars ($40,000) on February 2, 1901.

All of the circumstances mentioned above, and many others which will be found in the record, go to show conclusively that Love did not consider that the book entries and alleged "settlements" were *bona fide*, but that he was merely making them in order that his books might show up on examination, and more particularly because he was in such desperate need of money for the Loray mills and he desired to have the respondent and the Avon mills "assist the Loray."

Finally, as further evidence of Love's methods of business, we find that he admits that he did not give W. L. Wells notice of the meeting of the stockholders of the Loray mills (p. 98); and yet Love went into the meeting of the stockholders of the Loray mills and acted as proxy for W. L. Wells and admitted that he had no authority whatever to do so (pp. 91–92).

Authority of W. L. Wells.

An attempt has been made in this case to magnify the authority which W. L. Wells had as president of the W. L. Wells Company. It is claimed that he was the general manager of the company, but there is no testimony to support such a contention.

The facts show that he subscribed for one-half of the capital stock, John T. Wells for one-fourth, and George Butterworth for the remaining one-fourth. W. L. Wells was

president, George Butterworth was vice-president, and John T. Wells was secretary and treasurer. All three of these men constituted the board of directors, so that W. L. Wells not only did not have a majority of the stock, but the other two constituted a majority of the board of directors. It is true that W. L. Wells was a man of larger means than either of the other two, but it surely cannot be contended that because one stockholder has larger means than the others that he therefore has greater authority in controlling the affairs of the company than the others who have equal holdings in the corporation.

On page 30 the witness, John T. Wells, was asked if W. L. Wells was not the whole of the concern, to which he replied:

"No, sir. He was not.
"Q. In what particular was he not?
"A. He didn't have the entire management of it and he didn't furnish everything.
"Q. What did he not have control of?
"A. The making of contracts, the selling of cotton and everything else.
"Q. Didn't he generally make the contracts?
"A. He did sometimes."

The witness then proceeded to state that while W. L. Wells transacted the business in North Carolina they all advised about the policy of the business there, held directors' meetings, and discussed the affairs of the company.

John T. Wells was the treasurer, kept the books of the company, and did a large part of the correspondence in this case. It is true that W. L. Wells wrote many letters about the business of the company, to which he signed his own name, but it is a matter of general knowledge that such a practice is common, and it does not thereby increase the authority of the agent who does it.

W. L. Wells had his own private letter book. These private letters were copied in his private letter book, while the letters about the business of the Wells Company, although

signed by him individually, were copied in the letter book of the corporation.

There is nothing in this case to show that W. L. Wells had any authority whatever, other than that a president ordinarily has, nor that he had any power in the making of contracts for the sale of cotton beyond that usually possessed by agents who are appointed for the purpose of making sales.

Subscriptions of Stock to Loray Made for W. L. Wells Individually.

It is not denied that W. L. Wells wrote Love that he would agree to take stock amounting to $50,000 to come in on the last payments of the stock; but it is denied that W. L. Wells ever agreed that any part of the purchase-money of the cotton should be paid on his subscription to the stock. On the contrary, his several letters already referred to distinctly show that he told Love not to "mix up" these accounts with anything else, and he wrote many letters calling upon Love for a payment of the entire amount due for cotton.

It cannot be controverted but that whatever subscription to the stock of the Loray was made by W. L. Wells was made by him for his own individual benefit. The $10,000 subscription was made in the letter of July 15, 1900 (p. 58), in which he said: "You can only depend on *me* for the $10,000;" and in the letter of October 4, 1900 (p. 62), he not only said, "I have arranged to take the $50,000 stock," but he further said, "*I do not want my arrangements with you and the Loray known to them, hence in writing me about this please mark your letters personal.*" It is difficult to see how the personal character of this subscription could have been mephasized more fully.

When Love was asked on the stand how he expected these matters as to the Loray stock to be kept from the Wells Company, he replied (p. 96): "We didn't know how we

would arrange it. He left it entirely with me." Love further admitted (p. 91) that he did mark all the letters "personal," and John T. Wells testified (p. 35) that all of these letters, including the letter of February 2, 1901, came marked "personal;" that he did not open them and knew nothing whatever of their contents.

Besides this, the proposed arrangement contemplated that W. L. Wells should become the vice-president of the Loray and should individually buy cotton for it. So that the arrangement, instead of being for the benefit of the W. L. Wells Company, contemplated that the company should cease to buy the cotton and that W. L. Wells should do it individually (bottom of page 66).

By turning to the remarkable entries of deposits made in Love's bank, found on pages 140 and 141 of the Record, it will be seen that the Loray mills is credited with two payments aggregating $50,000, as made not by W. L. Wells Company, but by W. L. Wells individually, showing that Love treated the stock subscription as W. L. Wells' individual matter.

No Evidence from Which Ratification by Wells Company Could be Inferred.

We have endeavored to show that the entries of credits made by Love were not intended as *bona fide*, but were only for the purpose of enabling him to use the funds of the Wells Company in aiding the Loray mills. If this is true, then there was nothing to ratify, because there could be no ratification of a sham and subterfuge.

But, assuming that Love did make the applications in August, 1900, of $10,000 and in December, 1900, of $40,000 of the funds of the Wells Company in payment of subscription of W. L. Wells to stock of the Loray mills, we nevertheless submit that there was not a *scintilla* of evidence that

such acts were ever known to the Wells Company or were ever in any way ratified by it.

We shall presently show, in the argument, that such an act in diverting the funds of the Wells Company into an investment in stock of the Loray mills for the individual benefit of W. L. Wells was *ultra vires* and could not be ratified as a matter of law; but we are now assuming, for the sake of the argument, that these acts could have been ratified ,and we search in vain for any evidence of such ratification.

At the outset we would have it understood that the alleged agreement between W. L. Wells and John F. Love, as disclosed by the testimony, was not made for the benefit of the Wells Company, and this company never received any benefit from it whatever. The inducement for the making of the contract was that W. L. Wells was to buy cotton for the three mills. This is shown by the testimony of Love (p. 66), where he was asked the question, "What inducement, if any, did you hold out for him to take shares in this enterprise?" to which Love answered that he told him that if he would come in with them and help to get this up they wanted him to be the purchasing agent for the mills of the cotton and buy all the cotton for the three mills, and, if he did so, they would like to make him one of the directors and vice-president of the mill; and on page 96 Love was asked the question, "You wanted Mr. Wells to buy the cotton for the new mill individually?" and answered, "Yes, sir." From this it is apparent that it was not contemplated that the Wells Company should get any benefit from the contract, but rather that W. L. Wells should supplant it as purchasing agent. The agreement was not to become operative until the Loray mills should be organized, and then W. L. Wells should become the purchasing agent for the three mills—that is, the Loray mills, the Avon mills, and The Gastonia Cotton Manufacturing Company, the respondent in this case. In fact, Love expressly admitted (p. 87) that

there had never been an intimation but that Wells was to continue to buy cotton. In the face of this testimony it cannot be reasonably contended that any of the cotton which was sold by the Wells Company to Love's mills was sold under the terms of this alleged agreement with W. L. Wells, because, as stated above, the alleged agreement was not to go into effect until the Loray mills was organized, and W. L. Wells should then become the purchasing agent for all three of the mills.

It is Hornbook learning that ratification cannot take place without *full knowledge*. We insist that this evidence shows not only that Wells Company did not have full knowledge of the acts of Love, but that it had no knowledge nor notice whatever that any such application of its funds had been made by Love.

Let us take first the $10,000 payment alleged to have been made on August 3, 1900. As to this, Love contends that after receiving the letter of May 18, 1900 (p. 122), telling him not to "mix up" the cotton account with anything else, but to remit the balance due, he proceeded, in a few days thereafter, to "mix up" accounts, and on the 3d of August, 1900, he turned over to the Loray mills the account of W. L. Wells Company, these being part of the same funds which he had so long held in his bank to the credit of the W. L. Wells Company, without their knowledge or consent.

Good faith required that if he was going to take the funds of the W. L. Wells Company and mix them up with the individual subscription, in violation of the instructions that he had received, that he should at least have given the Wells Company immediate and positive information as to what he had done, but instead of this we find that he states (p. 89) that the only notice which he ever gave them was more than a month after the transaction, and even then he gave them no other notice except that contained in the endorsement upon the letter to the Wells Company dated the 31st

of August, 1900. Let us here reproduce this letter with the endorsement:

"VICKSBURG, MISS., *August* 31, 1900.

"Mr. JOHN F. LOVE,

"*Treas., Gastonia, N. C.*

"DEAR SIR: Enclosed we beg to hand you a statement of your account to September 1st, showing balance due us for $12,691.67. May we ask that you remit us by return mail in full for this balance, and oblige.

"Yours very truly,

"W. L. WELLS COMPANY."

(Endorsed by John F. Love.)

"$10,000.00 stock Loray mills.
" 2,691.67 interest.

"$12,691.67 balance.

"We want to see your Mr. W. L. Wells about it when he comes to see us.

"Yours, JOHN F. LOVE, *Treas.*"

How can any reasonable person contend that this endorsement gave the Wells Company notice that Love had already applied $10,000 of the cotton money in payment of the subscription to the stock, or that he claimed the right to make such application? The most that can be said of it is that it was a suggestion or request that he be allowed to "mix up" the cotton account with the stock subscription—a thing which on the 13th of July he had been forbidden to do. That he merely meant it as a suggestion is shown from what he adds, viz: "We want to see your Mr. W. L. Wells about it when he comes to see us." Here Love, as though remembering that W. L. Wells had written him on May 18 not to mix up the cotton account, is at most suggesting that he would like to see Mr. W. L. Wells about it when he came to Gastonia. As a matter of fact W. L. Wells was due in Gastonia about the time this letter with the endorsement on

it was received at Vicksburg (p. 31), and yet Love did not mention a syllable to Wells during the visit of September, 1900, about his having credited the account with $10,000 (p. 89).

Love pretended on his examination (pp. 88–89) that the "it" which he wanted to see Wells about was the item of interest, but that this is not true is shown by the fact that the accounts were due 30 days from date and Love knew this fact (p. 94), and he had received statement after statement calling on him for interest, to which he had not made the slightest objection, but now he would have us believe he was "kicking" about interest. Besides that, it must be admitted here and now that the charge of interest was correct. From all this, it is too apparent for controversy that the "it" which Love wished to see Wells about was the stock subscription in order that he might, if possible, get W. L. Wells to arrange it in some way so that the $10,000 which he had, one month before that, wrongfully and unlawfully taken of the funds of the Wells Company and paid over to the Loray might be allowed to stand, and that he in his financial straits might not be required to pay it back again.

This much can be reasonably inferred from all the facts as they are now known to us, but at that time the Wells Company knew absolutely nothing about these facts, because Love had purposely concealed them and they were not disclosed until on the trial of this action when Love's books were produced in court.

The undisputed fact, as testified to by John T. Wells (p. 35), is that he positively had never heard anything of any subscription to stock of the Loray mills, and that he did not know what Love's endorsement referred to. The letter was filed away among the papers of the company, and nothing was ever said or thought about it, and John T. Wells, the treasurer and bookkeeper of the Wells Company, had not the remotest idea that Love had attempted to take the funds of the Wells Company and pay them over to the Loray

mills. It is also undisputed that George Butterworth, who was director and vice-president, did not know of it and did not assent to it (bottom of p. 35).

In the face of the ambiguous language of the endorsement on the letter, and in the face of John T. Wells' positive testimony that he did not know what it meant, and that the endorsement was never talked over or mentioned in the corporation, and in the face of Love's deliberate refusal to give the company notice of what he had done, it is now contended that this endorsement gave the Wells Company full notice requisite for a ratification of the application of $10,000 of the cotton money to the stock subscription!

But it is contended that after Love returned the letter of August 31, with the endorsement on it, the Wells Company never made demand for the $12,691.67. Upon this failure to make demand it is sought now to deduce the conclusion that the reason no demand was made was because the Wells Company admitted that nothing was due. It is obvious that such a contention is unfounded when we consider that the Gastonia Company must now admit that a part of the $12,691.67, to wit, the sum of $2,691.67, interest, is due here and now. If the failure to make demand shows that the Wells Company admitted that the $10,000 had been paid, it also proves that the Wells Company admitted that the $2,691.67 was not due, and this makes out a clear case of *reductio ad absurdum*, since the Gastonia Company must here and now admit that it owes the interest to the Wells Company.

But we submit that the correspondence shows that during the fall and winter of 1900 the Wells Company did make frequent demands for money. In fact, during the fall Love sent the company $25,000 on general account, and, as no specific application of it was made at the time it was sent, the law would have applied it in payment of the first item of the debit, which was $12,691.67. It is true that some weeks after the $25,000 was remitted Love requested that it be applied to specific invoices, and this was done by the

Wells Company. But the point we make is that Love was remitting money. Now, we are utterly unable to see what difference it could make, if these cotton mills were to be indebted to the Wells Company to the amount of $12,000, why the one item might not as well stand as the other.

Let us now turn to the alleged credit or application on December 3, 1900, of $40,000 of the cotton money on the stock subscription.

Love admits that he gave the Wells Company no notice whatever of having charged them with this $40,000. Both this sum and the $10,000 had been first placed by Love to the credit of the Wells Company in the extraordinary and unheard-of bank account which the Wells Company had in Love's bank, and which the Wells Company never heard of until on the trial of this action. Now, absolutely the only notice which it is claimed that Love ever gave of the $40,000 transaction is contained in the letter written February 2, 1901, by Love to Wells (p. 62), which contains these words:

"I have paid in your $50,000 stock and can send you certificates at any time in any way you suggest, and before issuing them will await your advice. Please have our account with your house credited with the amount."

Now, as to this letter, it may not be improper to call the attention of the court again to the fact that when it was offered in evidence we objected to it (p. 25), and it appears from the record (pp. 111–112) that his honor Judge Boyd admitted it, and also the letter from Wells to Love of October 4, 1900, subject to the requirement that it should thereafter be shown in the evidence that the Wells Company had authorized the application of these funds or had ratified it. At the close of defendant's evidence we moved to strike out all this testimony because no such antecedent authority nor subsequent ratification on the part of the Wells Company had been shown, and his honor held with us and thus, in effect, ruled out both the letter of October 4, 1900, and this

letter which we are now considering, dated February 2, 1901 It would seem, therefore, if this ruling was correct, that neither one of these letters should be considered unless the court should hold that Judge Boyd was in error in ruling them out.

But for the sake of this discussion let us consider that all of the evidence ought to have gone before the jury, and we will therefore examine the facts surrounding the letter of February 2, 1901.

In the first place it was in reference purely and solely to the affairs of the Loray mills. It was marked "Personal" by Love for the express purpose of keeping the Wells Company from knowing anything about it. It did not profess to be in reply to any letters or telegrams theretofore received from the Wells Company, but its contents will disclose that it was purely personal. In the letter of October 4, 1900, Wells had notified Love that he did not want his associates to know anything about the Loray stock subscription and had requested Love to assist him in keeping it from his associates by marking his letters "Personal." Not only did Love admit (p. 91) that he marked the letters "Personal," but J. T. Wells testified (p. 35) that this letter and others came addressed to W. L. Wells marked "Personal," and that he did not open them, knew nothing of their contents; that Mr. Butterworth was in Yazoo City and could not have known of them, and that he (J. T. Wells) never learned anything about Love's letter of February 2, 1901, until after this suit was brought.

Here, then, was an agreement between Love and Wells to keep the matter of the Loray stock subscription a secret from the Wells Company, and in pursuance of that agreement Love wrote a letter about Loray matters, stating that he had paid in the $50,000 subscription which Wells had made—marked the letters "Personal" for the express purpose of keeping it from the Wells Company—and yet it is now gravely contended that a jury should have been allowed

to find that the Wells Company did know all about this letter, and had full knowledge of it requisite to constitute a ratification!

But looking at the contents of the letter itself we find that there is nothing to ratify. Counsel for plaintiff in error have treated this letter as though it gave full information of all that Love had done, while on the other hand we maintain that if the letter itself had been addressed to the Wells Company it did not contain any information whatever from which the Wells Company could have inferred that Love had already applied $50,000 of their money to the payment of the stock subscription, nor even that he claimed the right to do so.

Love says in this letter that he, individually and personally, had paid in for W. L. Wells, individually and personally, the sum of $50,000, and he merely requests W. L. Wells to make some arrangements whereby these payments could be credited up on the accounts between Love's mills and the Wells Company. Suppose that, instead of using the language he did, Love should have written to the Wells Company itself, stating that he had paid an individual debt of W. L. Wells amounting to $50,000, and he had asked the Wells Company to allow him a credit for that amount. Would any reasonable man argue that such a request would amount to full notice that he had already made the credit himself, or that it amounted to a claim that he was entitled to the credit as a matter of right? The point we make here is that the letter was merely a request and there was nothing in it which could be ratified by the Wells Company other than the affirmative granting of the request.

But it is said that Love did not intend that this should be kept from the Wells Company. If that is true, then we ask why did he mark the letters "Personal," or, stronger still, if he thought that he was entitled to a credit from the Wells Company as a matter of right, why did he not address the letter to the company itself, resenting the telegraphic

duns and stating that he had already paid them the sum of $50,000 in the way of a subscription to stock of the Loray mills? The fact that he asked W. L. Wells to have his house credit the Avon and Gastonia mills with the $50,000 is by no means inconsistent with the idea that he expected W. L. Wells still to keep the matter a secret. Love testified (p. 96), when asked how he expected to keep this from the Wells Company, that W. L. Wells trusted to him, and the way he undertook to keep the matter from the company was by marking the letters "Personal." Knowing the desire of W. L. Wells that the matter should be kept from the Wells Company, the natural inference was that W. L. Wells would give the company his check for $50,000 and say nothing about the Loray subscription. Wells had asked to have it kept secret and Love had no reason to suppose that Wells wanted it known at that stage. It is as though Love had written to Wells:

"I have paid $50,000 for you. My mills owe your company $50,000. It is useless for me to remit your house the $50,000, and hence you, instead of sending me the $50,000 you owe, can pay it to your house and get the house to give my mills the proper credit, and you can do this without letting them know anything about the Loray subscription. I have marked this letter 'Personal' in order that you may arrange it in your own way and keep the matter from the Wells Company."

But it is urged that the Wells Company did not make any demand on Love after that letter of February 2, 1901, was received, and from this it is contended that the Wells Company knew of it and ratified it.

We have already shown from the very nature of the letter that it was merely a request, and there was nothing to ratify, and could have been no ratification except by an affirmative granting of the request. The letter was not a statement that Love had made any application whatever of the credits.

But the uncontradicted testimony was that J. T. Wells,

who was treasurer and bookkeeper and had charge of the office of the Wells Company, knew nothing about this letter until after this suit was brought (p. 35). The uncontradicted testimony was (p. 36) that J. T. Wells, during the spring of 1901, asked W. L. Wells several times about the account and that W. L. Wells said that Love was hard up, and advised J. T. Wells not to push the Gastonia and Avon mills (bottom of p. 36). Here was a clear, reasonable, and uncontradicted explanation of the delay on the part of the Wells Company to make any demand, and shows that during this time the Wells Company had no notice whatever of the letter of February 2, 1901, and that its failure to make demand for the money was in no sense due to the receipt of that letter. How, then, could a judge, in the face of this testimony, have allowed a jury to find, from the mere fact of the failure to demand payment of the account with the Wells Company, that the company knew about the letter and had solemnly agreed to ratify the transaction and agreed to allow the credit of $50,000?

Besides this, J. T. Wells testified (p. 36) that these mills had owed the Wells Company large amounts before and that during the spring of 1901 they began selling them for cash. In addition to this, Love had always contended that the Wells Company had agreed to carry his mills for as much as $65,000, and he gave the Wells Company this as a reason for not responding to their duns (p. 83). The Wells Company had written in a letter (p. 115) that it would carry Love's mills for from $60,000 to $70,000, yet it is now contended that because the Wells Company carried Love's mills for $65,000 for several months this fact must be invoked to prove the ratification of the $50,000 payment.

But, again, the argument is that the failure to make demand after February 2, 1901, tends to show that the Wells Company admitted that nothing was due, but, unfortunately for the plaintiff in error, this argument proves too much. The Gastonia Company here and now admits that it owed

several thousand dollars to the Wells Company during all this time. How, then, can it be seriously contended that the failure to make demand during the spring of 1901 proved, or tended to prove, that the Wells Company allowed this $50,000 payment, when it is here and now admitted that during all that time the Avon and Gastonia mills really owed several thousand dollars?

Whatever inference might otherwise be drawn from the delay of the Wells Company to make demand, it is nevertheless true that they did make a demand for the whole amount in a letter of August 12, 1901 (p. 57), and no one can doubt for a moment that if Love had really believed that his mills were entitled to the credit of fifty thousand dollars ($50,000) he would have replied to this letter by return mail, asserting his rights in the premises, yet he made no reply, and, as already stated, he admitted that he never once asserted his right to the credit until October, 1901, when the attorney for the Wells Company threatened him with suit (p. 101).

It is further suggested that the fact that W. L. Wells was not put upon the stand could be used against the Wells Company as tending to show that it was afraid of his testimony, and that the jury might have been allowed to draw conclusions from the failure to put him on the stand. This seems plausible at first blush, but an examination of the facts will show that there is absolutely nothing in the contention. It is true that W. L. Wells was in the court-house during this trial. The record discloses that when the plaintiff's case was opened the Wells Company put J. T. Wells, the treasurer and book-keeper, upon the stand and proved the account by him, and proved by him the organization of the Wells Company. Here the Wells Company rested its case, because upon the plea of payment the burden was upon the Gastonia Company. When the Gastonia Company undertook to make good its plea of payment it introduced certain matters in evidence in reference to what passed between Love and W. L. Wells in

regard to the stock subscription. To all of these matters the Wells Company duly objected, but at that stage his honor stated that he would admit the evidence subject to the requirement that the plaintiff in error should show either that W. L. Wells had authority to bind his company or that the company had ratified the act. When the evidence of the plaintiff in error was closed we moved that all of the testimony as to what had passed between Love and Wells should be ruled out, and Judge Boyd then and there held that no antecedent authority nor subsequent ratification on the part of the Wells Company had been shown, and he then and there stated that as the case stood he would instruct the jury that the defendant had not made good its plea of payment. Now it is contended that in spite of this ruling of Judge Boyd at the close of the defendant's case the W. L. Wells Company should have replied to the testimony and should have put W. L. Wells upon the stand to contradict the statements of Love, although his honor had ruled the evidence out and held that it was wholly insufficient of itself to establish the defendant's plea of payment. From all this it is too apparent for argument that no inference can be drawn which is hurtful to the Wells Company from the fact that W. L. Wells was not put upon the witness stand.

It may be said in this connection that, while W. L. Wells himself was not put upon the witness stand, letters written by him were introduced, and in every single one of them he flatly contradicted the testimony of J. F. Love as to any agreement on his part to have the funds due his company "mixed up" with the stock subscription of the Loray mills, and in the very letter of October 4, 1900, in reference to the $50,000 subscription, he distinctly wrote that he desired to pay his subscription himself and let it come in on the last payments during the month of January, as he could not arrange his personal affairs so as to do it earlier.

Now, in the face of the fact that Love marked the letter of February 2 1901, as personal and did all he could to

keep the Wells Company from knowing its contents; in the face of the fact that J. T. Wells, the only witness on the point, swears positively that he knew nothing about the letter of February 2, 1901, and that the failure to make demand during the spring of 1901 was not due to that letter and was not due to any agreement on the part of the Wells Company to allow the credit; in the face of the fact that Love always claimed that the Wells Company had agreed to carry his mills for $65,000; in the face of the fact that the plaintiff in error now admits that it owed several thousand dollars during the spring of 1901, when no demand was made, it is nevertheless now insisted that Judge Boyd should have left it to the jury to say whether the bare fact that the Wells Company had indulged the Gastonia and Avon mills and had not made demand for several months was not sufficient evidence to show that the Wells Company, with full knowledge of the facts, had ratified the $50,000 payment. If this should have been done, then, we submit that it is the first time in the history of jurisprudence that a party who had done all in his power to keep another party from finding out a fact would nevertheless be permitted to come into court and have the jury find as an inference that, in spite of his effort, the other party had found out the fact, and, with full knowledge, had ratified the act which he had endeavored to keep from him!

RESTATEMENT OF CONTENTIONS OF WELLS COMPANY AS TO ALLEGED SETTLEMENT OF AUGUST 3, 1900, AND DECEMBER 3, 1900.

We give here a restatement of our contentions as to the alleged settlements of August 3 and December 3, 1900, which are pleaded in the answer. We shall give first our positions which are applicable to both of these alleged settlements, and then the positions which are applicable to each one

separately. Many of these positions will be argued more at length in the succeeding part of this brief.

(1.) Respondent in its answer and through its counsel on the trial having admitted the debt to have been contracted exactly as alleged in the complaint, and having set up the affirmative plea of payment and settlement, the burden of proof as to this issue was on the respondent, and it was necessary that the respondent prove, by competent evidence, every material fact necessary to make out the pleas of payment and settlement.

(2.) It is admitted that the respondent did not produce a single statement of account marked paid (R., p. 86). Remittances were always made by specific invoices, and it is admitted that many of the invoices were never marked paid.

(3.) There has been an absolute failure on the part of the respondent to show that two of the officers of the Wells Company, John T. Wells and George Butterworth, ever knew anything about these alleged settlements or ever assented to them. Indeed the same is true also of W. L. Wells, as there is no evidence that he was ever informed by Love of these alleged settlements.

(4.) The book entries made by Love were a sham and a subterfuge—were never intended by him to be settlements and never so treated by him. They were intended merely to make his books appear to be balanced, and particularly to enable him to "assist Loray."

(5.) Love never made any contention that the $50,000 of the money of the Wells Company had been paid to the Loray mills until a few weeks prior to the commencement of this action when threatened with a lawsuit, and even then, in his conversation with plaintiff's attorney, he did not give

the attorney any information of the nature and terms of the alleged agreement with W. L. Wells, but merely stated he would, if sued, claim a credit. In his letter of February 2, 1901, he did ask W. L. Wells to have the Wells Company credit Love's mills with the $50,000, but this was merely a request which all the evidence shows was never complied with. It required an affirmative assent to this request on the part of the Wells Company, with full knowledge of all the facts, before the credit could have been allowed.

(6.) The petitioner denies that W. L. Wells ever authorized Love to apply the money of the Wells Company to the payment of W. L. Wells' individual subscription, and claims that the letters of W. L. Wells and the replies of Love all show that there was no such agreement; but conceding that there was such an agreement, then the Wells Company contends that W. L. Wells had no authority, either express or implied, to make any such agreement.

(7.) There is no contention that W. L. Wells had express authority to make the alleged agreement, and it is manifest that he had no such implied authority for the following reasons: (*a*) W. L. Wells was the president of the Wells Company and its agent to sell cotton, and there is no evidence that he had any authority other than that usually possessed by the president of a corporation and by its selling agent; (*b*) W. L. Wells, as agent of the Wells Company for the sale of cotton, had no implied authority to accept anything but money in payment of cotton; (*c*) the alleged agreement was so unusual and so much out of the ordinary course of business that no agent could be presumed to have power to make such a contract; (*d*) the contract was not for the benefit of the Wells Company, but for the personal and individual benefit of W. L. Wells, and according to Love's testimony the consideration, or, to use his own language, the "inducement" (R., p. 66), for making the agreement was

that W. L. Wells should supplant the Wells Company as purchasing agent for the three mills as soon as the Loray mills was organized. No agent could be presumed to have authority to make a contract detrimental to the interests of his principal; (*e*) even if the Wells Company were a partnership, as held by the Circuit Court of Appeals, then W. L. Wells, as one of the partners, could not be presumed to have authority to make a contract for his partnership which was for his own benefit and to the detriment of the interests of the partnership.

(8.) There is no evidence of ratification by the Wells Company of either one of the alleged settlements: (*a*) It is the plainest principle of law that the Wells Company could not be held to have ratified these settlements unless it was shown that the company had full knowledge of all the material facts pertaining thereto. The burden of proof upon this point was upon the respondent and it has wholly failed to show facts from which it could be inferred that the Wells Company, with full knowledge, ratified the "settlements;" (*b*) the uncontradicted testimony is that the Wells Company did not have any knowledge whatever that Love had attempted to apply what was due it to the payment of W. L. Wells' subscription; (*c*) it is submitted that the evidence shows that W. L. Wells himself did not have any notice that Love had applied the Wells Company's money to the payment of his subscription, but, conceding that W. L. Wells had notice of it, the knowledge of W. L. Wells could not be imputed to the Wells Company for the reason that he was acting for himself individually, and knowledge acquired by him in a matter in which his interests conflicted with the interests of the Wells Company could not be imputed to the Wells Company; (*d*) ratification of an act whereby $50,000 of the money of the Wells Company was applied in payment of W. L. Wells' individual subscription could not have been effected so as to bind the Wells Company except

by the corporate act—that is, by the action of the board of directors of the Wells Company. There is no contention that the board of directors ever acted upon the matter, but, on the contrary, the uncontradicted evidence shows that John T. Wells and George Butterworth, two of the directors, owners of one-half of the capital stock, who were treasurer and vice-president respectively, never in any way assented to this misappropriation of the funds of the W. L. Wells Company; (*c*) the Wells Company never received any benefit from the alleged agreement, but, on the contrary, one of the important stipulations of the agreement was that W. L. Wells should supplant the Wells Company as purchasing agent for Love's mills. The agreement was not to become operative until the Loray mills was organized, and then W. L. Wells was to become the purchasing agent for the Loray mills, the Avon mills, and the respondent, The Gastonia Cotton Manufacturing Company. Not a bale of cotton was ever sold by the Wells Company to Love's mills by virtue of or under the terms of this alleged agreement.

(9.) The alleged agreement, whereby $50,000 of the money of the Wells Company was to be applied in paying a stock subscription of W. L. Wells, was *ultra vires* of the Wells Company as a corporation, and, the contract being *ultra vires* of the corporation, it follows that it was incapable of ratification, and that even if the Wells Company had received benefits under it this could not amount to a ratification of an *ultra vires* contract.

(10.) The bringing of this suit was not a ratification of the alleged agreement between Wells and Love, because (*a*) not a bale of the cotton in controversy was sold under the terms of that agreement; (*b*) the complaint alleged the sale and delivery of cotton under several contracts, and the answer admits these several contracts. There was a demand for cash with each invoice and an agreement in

writing on the part of Love to pay cash or, to use his own language, to "remit promptly" (R., p. 127); (c) even if the cotton in question had been sold under the terms of the agreement alleged in the answer, yet all the evidence shows that the Wells Company knew nothing of the vicious element in the contract until after it had parted with the cotton, and it is a plain rule of law that where a party does not learn of the vicious element in the contract until it is too late to repudiate the contract and save himself harmless, then the bringing of a suit upon the contract does not ratify it.

(11.) It may be noted, finally, that the respondent wholly failed to make out the plea set up in the answer in regard to these "settlements." It is alleged in the answer that "W. L. Wells, in order to secure the sale of said cotton to the defendant, agreed with the said John F. Love that if he, as agent of the defendant, would agree to purchase cotton from the said Wells, or from the partnership or corporation represented by him, a portion of the purchase-money due for said cotton might be invested in the stock of the said proposed manufacturing plant, which was known as the Loray mills, and defendant avers that said cotton was purchased by its agent and manager with the express understanding that the defendant should use a part of the purchase-money in that way." The defendant further alleges that the "settlements" were had "in strict accordance with the terms of the contract." There is not a word of the testimony which supports this allegation. Not a bale of cotton was sold by the Wells Company as a result of the alleged agreement. On the contrary, the agreement, as testified to by Love himself, shows that the cotton which is in controversy was not sold in consequence of this alleged agreement, for Love admitted that there never was a suggestion that Wells should cease to sell him cotton (p. 87). There was, therefore, a total failure of proof to support this most material allegation.

(12.) The answer further alleged that the agreement between Wells and Love was that the money of the Wells Company was to be "invested" in stock of the Loray mills—plainly meaning by this to allege that the Wells Company was to own the stock in the Loray mills which should be thus purchased. The evidence all tended to show that the stock subscription was that of W. L. Wells individually and that it never was contemplated that the Wells Company should own any stock in the Loray mills. The answer alleged that the "settlements" were made "in strict accordance with this agreement," whereas the proof showed that if any "settlements" were made at all they were not made in accordance with the terms of the contract set out in the answer, but were made pursuant to a totally different contract. There was, therefore, an entire failure of proof, also, upon this material allegation.

(13.) Judge Boyd refused to permit the jury to find that the Wells Company had ratified any appropriation of its money to the payment of the stock subscription of W. L. Wells, because the only possible phase of the case in which there could have been such a finding by the jury was that by the silence of the W. L. Wells Company and the failure to demand money there might have been an inference of ratification on its part if this had been unexplained, but Judge Boyd held that the explanation made by John T. Wells was entirely satisfactory, and when John T. Wells testified positively that the Wells Company had not ratified this misappropriation of the company's money and testified that the Wells Company knew nothing about these alleged "settlements," the judge, seeing his demeanor upon the stand and taking his testimony in the light of the vacillating and unsatisfactory testimony of John F. Love, would not permit the jury to find that John T. Wells had sworn falsely. He therefore ruled that the ends of justice required him to hold that there had been no ratification on the part

of the Wells Company, and that he should direct a verdict in favor of that company. It is respectively submitted that under a long line of decisions a Federal appellate court should not reverse this ruling of Judge Boyd.

CONTENTIONS AS TO ALLEGED SETTLEMENT OF AUGUST 3, 1900.

Having stated above our contentions applicable to both of the alleged "settlements" relied upon, we wish now to summarize the positions taken by us, which apply particularly to the alleged "settlement" of August 3, 1900.

(1.) There has been a total failure of proof that W. L. Wells authorized Love to apply the $10,000 of the Wells Company's money to the payment of his stock subscription. On the contrary, the written evidence, and particularly the letter of W. L. Wells of May 18, 1900 (R., p. 122), proves conclusively that he expressly refused to allow the company's money to be "mixed up" with his individual subscription.

(2.) If W. L. Wells did not authorize this application of the company's money before it was made, then there is not a scintilla of evidence that W. L. Wells knew anything about Love's attempt to charge the Wells Company with this $10,000. When the letter of August 31, 1900, with Love's endorsement on it, reached Vicksburg, W. L. Wells was not there, and John T. Wells testified that he never mentioned it to W. L. Wells. Love testified likewise that he did not mention the matter to W. L. Wells. So by the uncontradicted testimony W. L. Wells knew nothing of the alleged "settlement" of August 3, 1900, and could not have ratified it.

(3.) George Butterworth, the vice-president and one of the directors, knew nothing of Love's endorsement on this letter

of August 31, and there is no evidence to support any contention that he ratified the "settlement."

(4.) By the uncontradicted testimony of John T. Wells, who received the letter with Love's endorsement on it, he did not understand what it meant. He was the treasurer of the company and in charge of its home office, and he did not treat this as a "settlement." The books of the Wells Company for the season 1899–1900 were not balanced, but the full amount as now claimed by the plaintiff was left standing as due and unpaid.

(5.) Love admits that he gave the Wells Company no notice of the "settlement" of August 3, 1900, and it is a strange "settlement" that can be made without the knowledge or assent of the party whose money is being used in the "settlement." The endorsement which Love made on the letter of August 31 could not be construed by the wildest imagination into a notice of a "settlement" made on August 3, nearly thirty days prior thereto.

(6.) The endorsement of Love on the letter of August 31 was at most merely a suggestion that Love desired to apply $10,000 of the money due for cotton to the payment of Loray stock, and that he desired to see W. L. Wells about it. It was in no sense a statement that he had already made the application. If Love had supposed that there had been a "settlement" he could and would undoubtedly have so written in plain and unambiguous language.

(7.) This endorsement made by Love, being merely a suggestion, required positive affirmative action on the part of the Wells Company accepting it, and mere silence or failure to act could not be treated as ratification.

(8.) But we have the positive and uncontradicted testimony of John T. Wells that the Wells Company did not as-

sent to the suggestion or request made by Love. No Federal judge could have permitted a jury to find to the contrary unless he was satisfied that the testimony of John T. Wells was utterly false.

(9.) The failure to demand the specific sum after receipt of the letter of August 31, with Love's endorsement, was no evidence of ratification even if John T. Wells had not explained it, because it is shown that during the fall and winter of 1900 and 1901 Love's mills were largely indebted to the Wells Company and the Wells Company was demanding payments and payments were being made. It could make no difference that this specific sum was not demanded.

(10.) Besides this, the interest on the invoices for cotton sold during the spring of 1900 was due according to the admissions of respondent, and this interest was not demanded specifically. If the Wells Company failed to demand a sum which it must be admitted is still due, it is difficult to see how its failure to demand the $10,000 could be treated as an admission that that sum was not due.

(11.) Love himself did not consider that there had been a "settlement" on August 3, 1900. This is shown conclusively by the fact that in his letter of February 2, 1901, he requested that W. L. Wells would *then, at that date,* have the Wells Company credit the account with the *entire $50,000,* showing unmistakably that he did not consider that the $10,000 had been credited on August 3, 1900.

(12.) Conceding that the endorsement on the letter of August 31 put John T. Wells on notice that there was something relative to the Loray Mills stock and that he negligently failed to prosecute this inquiry, still his negligence, if such it be, could not operate to give the Wells Company notice of what John T. Wells might have found out. It is

a clear rule of law that it was the duty of the respondent to show that the Wells Company *actually* knew all of the material facts connected with a misappropriation of the company's money, and it will not do merely to show that by the exercise of diligence in prosecuting inquiries it might have known the facts. The burden was on the respondent to show *actual* knowledge.

Contentions as to Alleged Settlement of December 3, 1900.

We give here our positions which apply particularly to the alleged "settlement" of December 3, 1900, whereby it is claimed that $40,000 of the money of the Wells Company was applied to the payment of W. L. Wells' subscription:

(1.) This attempted appropriation of the company's money was without the consent of the W. L. Wells Company and in fact without the consent of W. L. Wells himself. The letters which passed between W. L. Wells and John Love during the fall of 1900 show conclusively that the Wells Company was demanding payment for the cotton sold and that Love agreed to "remit promptly" for all cotton bought.

(2.) Love admits that he gave the Wells Company no notice whatever of this "settlement" of December 3. Although repeated demands for payment were made by letters and telegrams during December and January after the book entries had been made, yet Love never at any time claimed that there had been a "settlement" and that the account had been balanced.

(3.) The letter of February 2, 1901, written by Love to W. L. Wells, was marked "Personal," and its contents never came to the knowledge of the Wells Company. It was

objected to by counsel for the Wells Company and was admitted by Judge Boyd, subject to the requirement that it should thereafter be shown that the Wells Company had knowledge of it. The respondent having failed to show that the Wells Company had knowledge of this letter, the letter was thereby rendered incompetent, and it should not be considered in this record, but should be treated as having been ruled out by Judge Boyd. This letter being ruled out, then the respondent will admit that there is absolutely nothing for it to stand upon to connect the Wells Company with the alleged "settlement" of December 3, 1900.

(4.) John T. Wells testified positively that he knew nothing of the letter of February 2. It came marked "Personal," and Love testified that he marked it "Personal" for the purpose of keeping the Wells Company from knowing its contents. It is a strange proposition that the respondent relies solely upon this letter to give the Wells Company notice of the "settlement" of December 3, 1900, when all the evidence shows that it was marked "Personal" for the express purpose of keeping the company from knowing its contents and that the company never knew of it.

(5.) But the letter, if it had been addressed to the Wells Company, was no notice of a "settlement" made on December 3 or at any other date. It was at most a request which required an affirmative action by the board of directors of the Wells Company. Mere silence on the part of the Wells Company could not be treated as acquiescence on its part, and there is a total failure of evidence to show that the Wells Company ever affirmatively acquiesced in the request made in Love's letter of February 2.

(6.) A mere failure to demand payment of money afforded at most only an inference if it had been unexplained. The testimony of John T. Wells explains fully why the demand

for payment was not made in the spring of 1901, and he shows conclusively that it was not because the Wells Company knew of the letter of February 2, 1901, but it was due to the fact that W. L. Wells requested that statements be not sent to Love for the reason that Love was "hard up." No Federal judge would have allowed a jury to find that the Wells Company had ratified the "settlement" of December 3, 1901, unless the judge was satisfied that John T. Wells had testified falsely.

(7.) But it is now admitted that several thousand dollars were due in the spring of 1901, during all the months when the Wells Company made no demand on Love. A failure to demand what was admitted to be due certainly did not cancel the debt, and it is not so contended now by the respondent. The fact that there was a large sum admitted to be due shows that the failure of the Wells Company to make demand cannot be attributed to the fact that the company knew of or assented to this alleged "settlement."

(8.) Finally, when demand was made in August, 1901, there was no contention that there had been any "settlement," and nothing said about it until shortly prior to the bringing of this suit.

DISCUSSION OF PROPOSITIONS OF LAW RELATING TO THE MERITS OF THE ACTION.

First Proposition: Conceding that W. L. Wells made the contract, set out in the answer, agreeing that a part of the purchase-money for cotton sold by plaintiff to defendant should be "invested" in stock of the Loray mills, this was beyond the scope of his authority and did not bind the Wells Company.

We have, in the foregoing part of this brief, endeavored to show from the evidence in this case that W. L. Wells never at any time agreed that the money of the Wells Company should be applied in payment of his stock subscription and have referred to several letters which are in evidence and which show conclusively that he expressly refused to allow Love to use the money of the Wells Company in this way. Passing this point, however, and conceding here for the sake of the argument that W. L. Wells made the agreement exactly as it is alleged in the answer, we submit, as a matter of law, that the Wells Company was not bound by this agreement.

In the first place, it is admitted that respondent did not show by any evidence at all that W. L. Wells had any actual or express authority to bind the Wells Company by this agreement, and we submit that under the facts of the case it is plain that he had no implied authority so to do, and that Judge Boyd was right in ruling that the Wells Company was not bound by the agreement, if any such was made by W. L. Wells.

The evidence shows that W. L. Wells was owner of one-half of the capital stock of the plaintiff corporation and was its president and its agent to sell cotton. There is not a line

of testimony which shows that he had any unusual authority not ordinarily possessed by such an officer and agent of a corporation, and the question of law before the court is whether the president of a corporation who is at the same time its agent to sell cotton has implied authority to bind his principal by an agreement that the money due for cotton sold shall be "invested" in the stock of another corporation.

Eliminating here for the present the point that whatever agreement was made between Wells and Love was plainly for the benefit of Wells individually, and assuming that it was for the benefit of the corporation, our position is that W. L. Wells had no authority to accept anything except money in payment for cotton, that the agreement was such an extraordinary and unusual one and so out of the usual course of business that no agent could be presumed to have such power, and that the burden of proof was upon the respondent to show that the agent had actual authority to make such an agreement.

We submit here only a few of the hundreds of decisions sustaining this view.

In Schutz *vs.* Jordan, 141 U. S., 213, Justice Brewer says:

"A party who seeks to charge the principal for the contract made by his agent, must prove that agent's authority; and it is not for the principal to disprove it. The burden is on the plaintiff. The plaintiffs would not contend they they had made out a cause of action against the defendant by proving that Hughes had made a purchase in their name. Of course they must go further, and prove that he had authority to purchase; and they must also prove that the purchase was within the authority conferred. Authority to buy one class of goods would not be authority to buy another and entirely different class. Authority to buy in the usual course of business would not be authority outside of that course of business. And when they rely upon contracts made with Hughes the burden is on them, and continues on them, to establish the contract which in fact was made, and that it was within the scope of his authority as agent."

In Bech *vs.* Donohue, 57 N. Y. S., 741, plaintiff's agent contracted to sell goods to the defendant under an agreement to accept advertising in pay for the bill. The court said:

"Auerbach was merely the special agent. His authority was limited to selling the plaintiff's goods with customary powers incident thereto. An agent empowered to sell cannot, in the absence of specific authority, bind his principal to the acceptance of payment in a medium other than money. Proof of an agency to sell does not warrant inference of authority to contract for advertising. Therefore it was wholly immaterial whether the defendant was notified that Auerbach had no power to pledge the plaintiff's consent to the terms of the memorandum. The position of salesman merely signifies limited authority. The defendant was, as a matter of law, charged with notice thereof, and before trusting to it was bound to ascertain its extent."

In Woodward *vs.* Jewell, 140 U. S., 247, it is said:

"It is a general proposition that power to sell gives authority to sell for cash only."

This case last cited quotes with approval Russell *vs.* Russell, 36 N. Y., 581, where it is held that a power to sell confers authority upon the agent to receive cash only, and does not permit him to convey property in satisfaction of a debt due by his principal, although the debt be a valid one.

In Brown *vs.* Smith, 67 N. C., 245, it is said:

"When an agent is authorized to sell property, he must sell for money, unless special instructions take it out of the general rule."

In this case the agent sold for Confederate bonds.

In Meacham on Agency, section 352, it is said:

"Mere authority to sell gives an agent no power to exchange the chattels for other property, or to take anything else than money in payment for them."

In Mora *vs.* Murphy, 23 Pac., 63 (Cal.), it is said:

"A power to sell and convey is *prima facie* a power to sell for money, usually for cash paid. To give it any other meaning there must appear to be some usage or custom in the country where the power is to be exercised modifying the *prima facie* significance of the power conferred. The same is true of a power to agree to convey and sell or sell and convey."

In Frost *vs.* Erath, 26 Am. State Rep., 831, *it is said:*

"The power to sell and convey does not include the power to convey in discharge of a debt or claim."

In St. John, etc., Co. *vs.* Cornwell, 35 Pac., 785, the court ruled that a general agent of a foreign corporation, having complete charge of its lumber yard, had no authority to agree to credit the amount of an agent's board upon the amount due by the defendant to the corporation for lumber sold.

We shall presently argue that the contract was *ultra vires* of the Wells Company, and, if so, it was a contract which the Wells Company itself could not make. If the Wells Company had no authority to make the contract, then there is no presumption that one of its officers or agents had such power, for it is a rule of law that an agent is never presumed to have authority to do what his principal cannot do.

In Alexander *vs.* Cauldwell, 83 N. Y., 480, the court passed upon the very question under discussion, and in the course of the opinion said:

"It can never be presumed that an agent of a corporation had authority to transact business which the corporation itself was not by its charter authorized to engage in."

To the same effect is Dabney *vs.* Stevens, 2 Sweny, 415.

Second Proposition: The alleged agreement as to applying money due for cotton in payment of stock of the Loray mills was clearly for the individual benefit of W. L. Wells, and the respondent, having been put on notice of that fact, was bound to know that W. L. Wells did not have authority to apply the funds of the Wells Company in payment of his individual subscription to stock of the Loray mills.

We understand it to be admitted by counsel for the respondent that the stock subscription made by W. L. Wells was for himself individually and not for the Wells Company. It is alleged in the answer that the agreement was that a portion of the proceeds of cotton might be "invested" in stock of the Loray mills, and by this it is clear that the respondent intended to allege that the stock was to belong to the defendant, but it must be conceded that all the evidence shows that this plea cannot be sustained, and, according to Love's own statement, the agreement undoubtedly contemplated that W. L. Wells should individually own the stock, and, as a part of the agreement, W. L. Wells was to be the vice-president of the Loray mills and the cotton buyer for all three of Love's mills. We have referred to this at some length in the former part of this brief.

Assuming, then, that W. L. Wells made an agreement with John Love whereby the money due the Wells Company for cotton should be applied in payment of the individual subscription of W. L. Wells to stock of the Loray mills, we submit that no argument nor citation of authority is needed to support the contention that W. L. Wells had no implied power to make any such agreement, it being conceded that he had no *express* authority from the Wells Company to make such a contract.

There is hardly found in the books a clearer statement of

this proposition than that made by Judge Boyd in the opinion written by him, in which he says (R., p. 188):

"From the evidence in this case, the conclusion is irresistible that the defendants were put upon notice that the contract which they allege for the Loray stock was a contract for the benefit of W. L. Wells, individually, and, being thus put upon notice of this fact, they were bound to inquire into the authority of W. L. Wells, no matter how general his powers might have been, as it is a rule of universal application that no agent, however general his authority, can apply his principal's property to the payment of his individual debts without the special authority of his principal; and it is a further rule of law that he who assumes to rely upon the authority of an agent to bind his principal to the discharge of his own obligations must prove actual authority if a contention arises."

In case of West St. Louis Savings Bank *vs.* Parmalee, 95 U. S., 557, Chief Justice Waite, speaking for the court in regard to the authority of a bank cashier to endorse the commercial paper of his bank, says:

"But certainly he is not presumed to have power, by reason of his official position, to bind his bank as an accommodation endorser of his own promissory note. Such a transaction would not be within the scope of his general powers; and one who accepts an endorsement of that character, if a contest arises, must prove actual authority before he can recover. There are no presumptions in favor of such a delegation of power. The very form of the paper itself carries notice to a purchaser, of a possible want of power to make the endorsement, and is sufficient to put him on his guard. If he fails to avail himself of the notice, and obtain the information which is thus suggested to him, it is his own fault, and as against an innocent party he must bear the loss."

A most interesting discussion of this question, and a case on "all fours" with the case at bar, will be found in Park Hotel Co. *vs.* Bank, 86 Fed. Rep., 742 (C. C. A.). This was a case in which the president of the plaintiff company, with gen-

eral powers, had discounted at the defendant bank a note of the plaintiff which the said president had executed and in which he had a personal interest. In discussing the question Judge Sanborn said:

"General authority to conduct the business and to issue the promissory notes of a corporation is authority to do those acts for corporate purposes, and in the interest of the corporation, only. It does not include the power to do them for the exclusive benefit of others, to the detriment of the corporation. And while a promissory note, made by an agent or officer having such authority, in the usual form, and taken by a stranger in the ordinary course of business, carries with it the presumption that it was issued for corporate purposes, and under lawful authority, a note issued by such an agent, payable to himself, is accompanied by no such presumption, but is itself notice that it is without the scope of his general power, and that it does not bind his principal, unless its execution was specially authorized by the corporation, through its directors or officers, other than the agent to whom it is payable. Such a note is a *danger signal*, which the discounter or purchaser disregards at his peril. It is notice to him that, if it is contested, he cannot recover upon it under any general authority in the agent, or at all, unless he proves that the agent was specially authorized to make that particular transaction, or to make contracts of the corporation with himself. To the general rule that the acts and contracts of a general agent, within the scope of his powers, are presumed to be lawfully done and made, there is an exception as universal and inflexible as the rule. It is that an act done or a contract made with himself by an agent on behalf of his principal is presumed to be, and is, notice of the fact that it is without the scope of his general powers, and no one who has notice of its character may safely rely or recover upon it without proof that the agent was expressly and specially authorized by his principal to do the act or to make the contract (West St. Louis Sav. Bank *v.* Shawnee Co. Bank, 95 U. S., 557; Bank *v.* Wagner (Ky.), 20 S. W., 535, 537; Smith *v.* Association, 78 Cal., 289, 293; 20 Pac., 667; Mor. Priv. Corp., par. 517; State Nat. Bank *v.* Newton Nat. Bank, 32 U. S. App., 52, 58; 14 C. C. A., 61, 64, and 66 Fed., 691, 694; Bank *v.* Armstrong, 152 U. S., 346, 352; 14 Sup. Ct., 572; Chrystie *v.*

Foster, 26 U. S. App., 67, 72; 9 C. C. A., 606, 609, and 61 Fed., 551, 553; Bank *v.* Atkinson, 55 Fed., 465, 472, 474; Chaflin *v.* Bank, 25 N. Y., 293, 295, 299, 301; Gallery *v.* Bank, 41 Mich., 169; 2 N. W., 193; Chamberlain *v.* Wool-Growing Co., 54 Cal., 103). This exception is a striking illustration of the policy of the law to prevent the possibility of a conflict between the duty and the personal interest of an officer or agent. It prohibits him from acting for both himself and his principal wherever their interests clash, and makes every act and contract in which he violates the inhibition voidable at the election of his principal. It forbids him to act at the same time as vendor and purchaser, or as lender or borrower, or as promisor and promisee. It forbids him to sell as the agent of his principal, and to buy for himself; to promise as the agent of his principal, and to accept the promise and reap the benefits himself."

In Chrystie *vs.* Foster, 61 Fed., 551, Judge Wallace, speaking for the Circuit Court of Appeals, said:

"He who assumes to rely upon the authority of an agent to bind his principal to the discharge of the agent's own obligation, must prove actual authority, if contest arises. No principle of the law of agency is better settled than that no person can act as the agent of another in making a contract for himself."

In Wilson *vs.* Railroad Company, 120 N. Y., 145, the rule of law controlling this question is graphically stated as follows:

"The general rule is that one who receives from an officer of a corporation notes or securities of such corporation in payment of or as security for a personal debt of such officer, does so at his peril. *Prima facie* the act is unlawful and unless actual authority is shown the person will be deemed to have taken them with notice of the rights of the corporation."

This case was approved in Wheeler *vs.* Holmes Savings Bank, 58 N. E., 598 (Ill.).

In the recent case of Hier *vs.* Miller, 63 L. R. A., 95, the

Supreme Court of Kansas, discussing the question as to whether a person dealing with the cashier of a bank must be presumed to know that the cashier had no authority to use the funds of the bank for his own private uses, says:

"But he could not absorb the funds of the bank in the satisfaction of his private debts without an express and especial authorization. The office of cashier does not import such power. Whether or not such authority actually did exist the defendant was bound to inquire. It has been well understood from of old that no man can serve two masters. He will hold either to one or to the other. For a like reason the cashier could not serve both himself and the bank in a single transaction, and because he was attempting such a perilous thing the defendant was put upon guard as to the extent of his power. 'It is against the general law of reason that an agent should be intrusted with power to act for his principal and for himself at the same time.'"

We could cite hundreds of cases from all the courts of the land sustaining this position, but we do not deem a further citation necessary.

It is immaterial whether the agreement to misappropriate the property of the corporation is made at the time the contract is entered into or *at any* subsequent period. Whether the contract is executory or executed, the doctrine applicable is the same, and the law places its seal of condemnation on all such transactions. It is the *kernel* which is rejected without regard to the form or appearance of the *shell*.

An agent cannot stipulate *in advance* for some unauthorized benefit to himself in any contract he makes for his principal, nor can he obtain that benefit out of the consideration of a *completed* or *closed* transaction made on behalf of that principal. It is the *unauthorized* diversion of the property of his *principal* to his own use which is prohibited, and the *date* of the conversion is of *no* importance where the statute of limitation does not apply.

Even if it were true that the plaintiff was a copartnership, as the Court of Appeals seems to hold, no advantage would

result to the defendant under the facts of this case in any ruling which transforms an organization which is solely intended by the parties connected therewith to be a corporation into a copartnership, for it would be also an unprecedented holding that the member of a copartnership without capital, or with a capital of ten thousand dollars accruing from its first year's profits, could use every dollar of that capital and forty thousand dollars more of the funds of the copartnership without the knowledge and approval of both of his other two partners in the payment of his individual subscription of fifty thousand dollars to the capital stock of another corporation yet to be formed, or even already organized. No such misuse of the funds of either a corporation or a copartnership would be or could be upheld, and as a result only one conclusion could be reached on the merits of this case.

Third Proposition: Ratification by the Wells Company will not be implied, because it has not been affirmatively shown that the Wells Company after full knowledge of all the material facts did some act which might be considered in law as ratification.

In this case we have shown in our statement of the facts that the company had no notice whatever of the facts; that J. T. Wells, the only witness, swore positively that he knew absolutely nothing about the stock subscription; that Love admitted that he had agreed to assist W. L. Wells in keeping the stock subscription matter from the Wells Company, and in pursuance of that agreement had marked the letters about the Loray stock "personal;" and, further, that Love never claimed that he gave the Wells Company any positive and direct information as to what he had done. All these facts show conclusively that the Wells Company had no notice at all of the material facts, whereas it is well established

that ratification cannot be insisted upon unless the principal had *full knowledge.*

We cite below a number of authorities supporting the proposition above stated, and, first of all, we give the statement of the doctrine by Judge Story, which has been quoted more often perhaps than any other rule of the law relating to principal and agent. It is found in the leading case of *Owings vs. Hull*, 9 Peters, 627, where the court says:

"No doctrine is better settled, both upon principle and authority, than this—that the ratification of an act of an agent previously authorized, must, in order to bind the principal, be with the full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is treated as invalid, because founded on mistake or fraud."

In Baldwin *vs.* Burroughs, 47 N. Y., 211, it is said:

"There can be no ratification of an act without knowledge of the act having been done. The ratification of an act previously unauthorized must, in order to be binding, be made with a full knowledge of all the material facts (Owings *v.* Hull, 9 Pet., 608; Nixon *v.* Palmer, 8 N. Y., 398; Seymour *v.* Wyckoff, 6 Seld., 224: Smith *v.* Tracy, 36 N. Y., 79, 83; 2 Greenlf. Ev., par. 66; Story on Agency, pars. 239, 253). The receipt, even from an agent, of money paid him on contract, does not bind the principal to the contract, unless he knows on what account the money was received and the terms of the contract (Penn. Co. *v.* Dandridge, 8 Gill & J., 323)."

In Steam Navigation Co. *vs.* Dandridge, 8 Gill & Johnson (Md.), 157, it is said:

"The county court in instructing the jury as to the facts which it would be necessary to find, to show an adoption and ratification by the defendants of the contract alleged to have been made by their agent, said, that if the consideration for such contract had been received by the agent, and paid over to the defendants, who retained the same, that then the said facts are in law an adoption of the contract, and as binding

upon them as if a previous authority had been given the agent.

"This instruction was held to be erroneous; first, because the jury were not required to find that the defendants knew on what account the money was paid them; and, second, that the defendants knew the terms of the contract on which the money was received."

In Bohart *vs.* Osborne, 13 Pac. Rep., 389, it is said:

"Where an agent makes a contract outside of his actual and apparent power, and the fruits of his contract are received by his principals in ignorance of the material facts, and without any knowledge that the contract had been made in their behalf or names, but were received and retained by them upon the information and understanding that the money was paid to satisfy in part a liability existing against the agent, and in their favor, such receipt and retention will not amount to an adoption and ratification of an unauthorized contract."

In Starr & Co. *vs.* Galgate Ship Co., 68 Fed. Rep., 243, it is said:

"The general rule is well settled that a ratification or confirmation of the unauthorized acts of an agent, in order to be effectual and binding on the principal, must have been made with a full knowledge of all material facts, and that ignorance, mistakes, or misapprehension of any of the essential circumstances relating to the particular transaction alleged to have been ratified will absolve the principal from all liability by reason of any supposed adoption of or assent to the previously authorized acts of an agent (Combs *v.* Scott, 12 Allen, 496; Clark *v.* Lyon, 7 Nev., 75; Reese *v.* Medlock, 27 Tex., 121; Bannon *v.* Warfield, 42 Md., 22; Barnard *v.* Wheeler, 24 Me., 412; Bennecke *v.* Insurance Co., 105 U. S., 355; Owings *v.* Hull, 9 Pet., 607, 629)."

In the leading case of Combs *vs.* Scott, 12 Allen, 496, it is said:

"But, upon another point, we are of opinion that the exceptions of the defendants are well taken. In instructing the

jury upon the question of ratification by the defendants of the contract alleged to have been made by their agent in excess of the authority granted to him, the judge, in effect, told the jury that such ratification would be binding upon the defendants, though made under a material misapprehension of facts, if such misapprehension arose from the negligence or omission of the defendants to make inquiries relative to the subject-matter. In the broad and general form in which this instruction was given, we are of opinion that it did not correctly state the rule of law, and that the jury may have been misled by it in the consideration of this part of the case.

"The general rule is perfectly well settled, that a ratification of the unauthorized acts of an agent, in order to be effectual and binding on the principal, must have been made with a full knowledge of all material facts, and that ignorance, mistake or misapprehension of any of the essential circumstances relating to the particular transaction alleged to have been ratified will absolve the principal from all liability by reason of any supposed adoption of or assent to the previously authorized acts of an agent. We know of no qualification of this rule such as was engrafted upon it in the instruction given to the jury in the present case. Nor, after considerable research, have we been able to find that such qualification has ever been recognized in any approved text-writer or adjudicated case. And, upon consideration, it seems to us to be inconsistent with sound principle.

"Ratification of a past and complete transaction, into which an agent has entered without authority, is a purely voluntary act on the part of a principal. No legal obligation rests upon him to sanction or adopt it. No duty requires him to make inquiries concerning it. Where there is no legal obligation or duty to do an act, there can be no negligence in an omission to perform it. The true doctrine is well stated by a learned text-writer: 'If I make a contract in the name of a person who has not given me an authority, he will be under no obligation to ratify it, nor will he be bound to the performance of it' (1 Livermore on Agency, 44. See also Paley on Agency, 171, note *o*). Whoever, therefore, seeks to procure and rely on a ratification is bound to show that it was made under such circumstances as in law to be binding on the principal, especially to see to it that all material facts were made known to him. The

burden of making inquiries and of ascertaining the truth is not cast upon him who is under no legal obligation to assume a responsibility, but rests on the party who is endeavoring to obtain a benefit or advantage for himself. This is not only just, but it is practicable. The needful information or knowledge is always within the reach of him who is either party or privy to a transaction which he seeks to have ratified, rather than of him who did not authorize it, and to the details of which he may be a stranger."

This able opinion is cited with entire approval in Benneck vs. Insurance Co., 15 Otto, 355, where it is said:

"The same rule applies to the ratification by the principal of the unauthorized acts of his agent. 'It is perfectly well settled that a ratification of the unauthorized acts of an agent, in order to be effectual and binding on the principal, must have been made with a full knowledge of all material facts, and that ignorance, mistake or misapprehension of any of the essential circumstances relating to the particular transaction alleged to have been ratified, will absolve the principal from all liability by reason of any supposed adoption of or assent to the previously unauthorized acts of the agent' (Combs v. Scott, 12 Allen, 496). And it has been declared by this court that: 'No doctrine is better settled, both upon principle and authority, than this: that the ratification of an act of an agent previously unauthorized must, in order to bind the principal, be with a full knowledge of all the material facts. If the material facts be either suppressed or unknown, the ratification is treated as invalid, because founded on mistake or fraud.'"

Fourth Proposition: It was necessary to show actual knowledge on the part of the Wells Company in order for any act on its part to amount to ratification, and it was not sufficient to show that the Wells Company or its officers, by the exercise of diligence, might have ascertained the facts.

The defendant has taken the position in this case that although the Wells Company did not know of what had passed between W. L. Wells and Love, yet if in the exercise of diligence the company or its officers could have found out the facts the law will treat it as if the company had actual knowledge. This proposition cannot be successfully maintained.

The undisputed fact is that Love did all in his power to keep the company from finding out the transaction by marking the letters "Personal," and yet it is now contended that the officers of the Wells Company ought to have thwarted Love in his efforts to conceal the transaction, and that they ought to have found out the facts by the exercise of reasonable diligence, and because they failed to exercise this diligence the law will treat the case as though the company had actually known all the facts.

But the defendant argues, as we understand it, that when the letter of August 31, 1900, went back to the Wells Company with the endorsement upon it made by John Love, this should have put John T. Wells on notice that something was transpiring, and that he should have followed this up, and, failing to do this, his company is chargeable with all that he might have found out. Conceding this to be true, it devolves upon the defendant to show that if John T. Wells had followed the matter up he could and would have ascertained all the facts, and particularly that he would have ascertained that there was an agreement between John Love and W. L. Wells, whereby the money due the Wells Com-

pany for cotton was to be applied in payment of W. L. Wells' individual subscription, and, further, that the contract contemplated that W. L. Wells should supplant the Wells Company as purchasing agent of Love's mills. There is not a line of testimony which shows that John T. Wells could have ascertained these facts if he had used the utmost diligence. Love testified that Wells trusted to him to keep John Wells and the Wells Company from finding out the facts (p. 96), and, further, that he did this by marking the letters "Personal" (p. 91), and it may be assumed that he could not have found out from W. L. Wells, because in the letter written by Wells to Love on October 4, 1900 (p. 62), Wells distinctly stated that he did not desire his associates to know about his plans, and for the purpose of having them concealed from his associates he asked that the letters be marked "Personal." Here, then, is affirmative proof that nothing could have been learned about the matter either from John Love or W. L. Wells. There was therefore no testimony from which the jury would have been warranted in finding that the Wells Company could have ascertained the terms of the agreement if its officers had been ever so diligent.

But we deny that the law requires that the principal must use diligence in a case like this to ascertain whether his agent is transgressing his authority, and that he will be held to have ratified the act of his agent if he fails to use diligence in finding out whether the agent has been exceeding his powers. Such a rule is, we submit, subversive of every principle of law. The principal has the right to assume that his agent is not going beyond the bounds of his authority, and he further has the right to assume that persons dealing with him will not be misled so as to rely upon the power of the agent to use the principal's money in satisfaction of the agent's debt. There is no obligation upon the principal to ratify the unauthorized acts of his agent, and, this being true, it must follow that there can be no duty

upon him to ascertain the facts. The following authorities sustain the proposition:

In Combs *vs.* Scott, 12 Allen, 496, already cited, the Supreme Court of Massachusetts says:

"Ratification of a past and completed transaction into which an agent has entered without authority is a purely voluntary act on the part of a principal. No legal obligation rests upon him to sanction or adopt it. No duty requires him to make enquiries concerning it. Where there is no legal obligation or duty to do an act there can be no negligence in the omission to perform it."

This was cited with approval by United States Supreme Court in Benneck *vs.* Ins. Co., 15 Otto, 355, *supra.*

And in Murray *vs.* Nelson Lumber Co., 143 Mass., 250 (9 N. E. Rep., 634), the court distinctly held that it was error to tell the jury that the board of directors knew of the acts of one of its officers, provided by the use of diligence they might have known it, and the court held that directors were not presumed to know of the acts of the agents merely because, in the exercise of diligence, they might have ascertained them.

In Smyth *vs.* Lynch, 7 Col. App., 383 (43 Pac., 670), the court says:

"The principal is under no obligation to accept the assumed agent's act. He need neither sanction nor adopt it. The law imposes on him no duty to make inquiries about it. Where there is no legal obligation, the question of negligence or diligence is of no importance. Whoever, therefore, relies on a ratification, is obliged to show it was made under circumstances which in law will bind the principal. The duty of making inquiries and ascertaining what has been done is not cast on the one who is under no legal obligation to take on himself the responsibility, but it rests with the party who would gain a benefit by the enforcement of the contract. The requisite information is justly assumed to be within the reach and control of him for whose advantage the contract was made. Concerning these details

the principal is presumed to be a stranger. While he may not close his eyes to what is within his own control, he is not to be charged because he has failed to make inquiries. He may not be held because he was negligent, or because his information might have been enlarged, or his misapprehension corrected, by diligence to ascertain the facts."

In Oxford Lake Line vs. Bank, 40 Fla., 359 (24 So., 483), the court says:

"Generally speaking, it does not devolve upon the principal to make inquiries as to the facts. He has a right to presume that his agent has followed instructions, and has not exceeded his authority. Whenever he is sought to be held liable on the ground of ratification, either express or implied, it must be shown that he ratified upon full knowledge of all material facts, or that he was willfully ignorant, or purposely refrained from seeking information, or that he intended to adopt the unauthorized act at all events, under whatever circumstances."

In Mechem on Agency, section 129, the doctrine is stated as follows:

"It may therefore be stated as the general rule, that, except in those cases where the principal intentionally assumes the responsibility without inquiry, or deliberately ratifies, having all the knowledge in respect to the act which he cares to have, any ratification of an unauthorized contract, in order to be made effectual and obligatory upon the alleged principal, must be shown to have been made by him with a full knowledge of all the material facts connected with the transaction to which it relates; and especially must it appear that the existence of the contract and its nature and consideration were known to him."

It must not be overlooked that in this case no harm could come to anybody from the failure of the Wells Company to act, even though the company had been fully apprised of the facts. On February 2, 1901, when it is claimed that Wells gave them notice, he had *already and more than a month*

prior thereto used the funds in paying the subscriptions to the stock. If the Wells Company had at that stage found out the facts, and had repudiated the transaction, the case would not have stood in any different shape from what it does at this very time. No rights of third parties have intervened and nobody has been prejudiced by the fact that no action has been taken by the Wells Company, even conceding that it knew all about the transaction.

Fifth Proposition: Any notice which W. L. Wells may have had of the transactions in question cannot be imputed to the Wells Company, because W. L. Wells was acting for himself in the matter in question.

We have already shown, in the statement of facts, that this contract was for the benefit of W. L. Wells individually. It contemplated that the Wells Company should be displaced and that W. L. Wells individually should supply the defendant and the Loray mills with cotton. The very fact that the parties determined to keep it from the Wells Company is sufficient proof that it was not for the benefit of that company.

Besides this, it is a singular contention that notice to W. L. Wells was notice to the Wells Company, although Wells and Love were endeavoring to keep the Wells Company from obtaining this notice.

If it be shown that W. L. Wells was acting either beyond the scope of his powers in making the contract or was acting for his individual benefit, then the law will not impute any knowledge which he may have had to the Wells Company. The notice which an agent has and which is imputed to his principal arises only when the knowledge is acquired by the agent while acting in the usual course of his employment and for the benefit not of himself, but of his principal

In American Surety Co. *vs.* Pauly, 170 U. S., 133, it is said:

"The presumption that the agent informed his principal of that which his duty and the interest of his principal required him to communicate does not arise where the agent acts or makes declarations not in execution of any duty that he owes to the principal, nor within any authority possessed by him, but to subserve simply his own personal ends or to commit some fraud against the principal. In such cases the principal is not bound by the acts or declarations of the agent unless it be proved that he had at the time actual notice of them, or, having received notice of them, failed to disavow what was assumed to be said and done in his behalf."

In Central Coal Company *vs.* Good & Co., 120 Fed., 793 (C. C. A.), the court says:

"Where an agent acts for himself in his own interest and against the interest of his principal without the latter's consent in a given negotiation or transaction, neither the notice nor the knowlege of the agent can be lawfully imputed to the principal." (The court cites a large number of authorities to sustain this position.)

Also in Bank *vs.* Thompson, 118 Fed., 798 (C. C. A.), there will be found an exhaustive discussion of the question and a review of the authorities.

To the same effect are:

Helms *vs.* Pabst Brewing Co., 57 Am. St. Rep., 899, and notes.

Distilled Spirits Cases, 20 Wal., 356.

Produce Co. *vs.* Biederbach, 58 N. E., 162.

Smith *vs.* Boyd, 62 S. W., 439.

Kenneth Ins. Co. *vs.* Bank, 70 S. W., 173 (Mo.).

Sixth Proposition: The alleged agreement could only have been ratified by the board of directors of the Wells Company.

This contract to invest $50,000—five times the authorized capital of the Wells Company—in the stock of the Loray mills was such an unusual and extraordinary contract that it could not be presumed to have been within the power of any agent or officer, and, conceding for the sake of the argument that the corporation could have made such a contract, certainly it could have been made only by deliberate *corporate* action. By the same token, if ratified, it must have been ratified by a *corporate* act, as it is a rule stated in Marsh *vs.* Fulton County, 10 Wall, 676:

"*That a ratification can only be made when the party ratifying possesses the power to perform the act ratified.*"

In the case at bar nothing short of positive affirmative action on the part of the corporation could have ratified this unusual and extraordinary transaction.

In Western National Bank *vs.* Armstrong, 152 U. S., 346, speaking of the power of a national bank to borrow money, and of the authority of the vice-president, and of the alleged ratification of the act, says:

"Nor do we doubt that a bank in certain circumstances may become a temporary borrower of money. Yet such transactions would be so much out of the course of ordinary and legitimate banking as to require those making the loan to see to it that the officer or agent acting for the bank had special authority to borrow money.

"Even therefore if it be conceded that it was within the power of the board of directors of the Fidelity national bank to borrow $200,000 on time, it is yet obvious that the vice-president, however general his powers, could not exercise such a power unless specially authorized so to do, and it is equally obvious that persons dealing with the bank are presumed to know the extent of the general powers of the officers.

"Without pursuing this part of the subject further, we think it evident that Harper had no authority to borrow this money and that the bank cannot be held for his engagements, even if made in behalf of the bank, unless ratification on the part of the bank be shown. It is scarcely necessary to say that a ratification to be efficacious must be made by a party who had power to do the act in the first place; that is in the present case, the board of directors; and that it must be made with knowledge of the material facts. There is not the slightest evidence shown in this record that the board of the Fidelity national bank, by any act, formal or informal, undertook to ratify Harper's actions in the premises, or that they ever had any knowledge of the transaction."

Seventh Proposition: The bringing of this suit to recover the purchase price of the cotton was not a ratification of the contract.

Counsel for defendant as a last resort have sought to make a great deal out of the fact that this is what they term "a suit upon a special contract," and it is argued that having brought this action upon a "special contract" the plaintiff is bound by all the terms of it, including the alleged agreement to allow the $50,000 due for cotton to be applied to W. L. Wells' stock subscription. This we submit is a technicality seven times refined.

At the outset of the discussion of this point we wish to emphasize again the fact that the contract between Wells and Love as alleged in the answer and as shown by the testimony are totally different. The answer alleged in effect that Love made it a condition precedent to the buying of cotton from the Wells Company that W. L. Wells should agree to allow the money that might become due for cotton to be invested in stock of the Loray mills to the amount of $50,000. The evidence, however, discloses that there never was any condition of this kind, and the evidence shows that the sale of cotton by the Wells Company was in no way con-

ditioned upon the alleged agreement. Not a bale of the cotton in controversy was sold by the Wells Company to the defendant in consideration of or as a result of the alleged agreement between W. L. Wells and John Love. The fact is that the contract had no relation whatever to a sale of cotton by the Wells Company. According to Love's own testimony there never was a suggestion that if W. L. Wells did not make the agreement in question, then the defendant would cease to buy cotton from the Wells Company. On the contrary, the sales were to go on just as before (p. 87). The real and only inducement or consideration was the one that Love held out to Wells (bottom of p. 66) that after the Loray mills was organized, then W. L. Wells should become the buyer for all the mills in the place of the Wells Company. So that the "special contract" taken in its most favorable light for the defendant amounted simply to this: Love agreed that if W. L. Wells would take stock in the Loray mills that W. L. Wells should become the vice-president of the Loray and buy cotton for the three mills, and W. L. Wells agreed on his part that Love might apply the purchase-money of cotton that was sold in the meantime by the Wells Company to Love's mills in satisfaction of this subscription of W. L. Wells; but it was nowhere stated or suggested that in consideration of this agreement the Wells Company would continue to sell cotton to Love's mills. In other words, the agreement between John Love and W. L. Wells did not cause the Wells Company to sell a single bale of cotton to the defendant. All of the cotton in question was sold at various times and under separate specific contracts, and yet it is now gravely argued that when the Wells Company brings a suit for the recovery of money due for this cotton it ratifies the collateral and unlawful agreement which it is claimed that W. L. Wells made, whereby the funds of the company were to be diverted in paying his individual debt.

But taking the contract as contended for by the defendant

there are several reasons why this suit did not amount to ratification.

(1.) In the first place, if the plaintiff has set out any "special contract" it has been admitted in the answer. Paragraph 2 of the plaintiff's complaint (p. 3) alleges that "the plaintiff sold and delivered to the defendant twenty-four hundred and eighty-three bales of cotton, for which the defendant agreed to pay the plaintiff $111,365.59, together with six per cent. interest after thirty days from the date of each invoice of cotton so delivered, a detailed statement showing the date of each invoice, the number of bales of cotton and the amounts due thereon, is set forth in the exhibit herewith filed, marked Exhibit A." On page 5 "Exhibit A" will be found, showing the number of bales and the prices at which it was sold. The defendant does not deny a single one of these allegations, as will appear by reference to the second paragraph of its answer (p. 7).

The Code of North Carolina, section 243, is a follows:

"The answer of the defendant must contain a general or specific denial of each material allegation of the complaint controverted by the defendant or of any knowledge or information thereof sufficient to form a belief."

And section 268 is as follows:

"Every material allegation of the complaint not controverted by the answer * * * shall for the purposes of the action be taken as true."

This statute has been construed in a number of cases, which will be found collated on page 288 of the third edition of Clark's Code of Civil Procedure. Among these we refer to Bonham *vs.* Craig, 80 N. C., 224; Stephenson *vs.* Felton, 106 N. C., 114; Harris *vs.* Sneeden, 104 N. C., 369.

It will appear, then, that the "special contract" which the plaintiff sued upon was a promise on the part of the defend

ant to pay the plaintiff not in an investment of its money in stock of the Loray mills, but, in the language of the complaint, the defendant agreed "to pay the plaintiff the sum of $111,365.59," and the answer did not deny this, and according to the provisions of the North Carolina Code, above cited, and the decisions of the North Carolina Supreme Court, this allegation was admitted by the defendant; so that if this is treated as a suit upon a "special contract" at all, the "special contract" was as set out in the complaint, viz., a promise to pay the plaintiff *in money* for the cotton sold.

(2.) It will be noted also that in the complaint the plaintiff alleges sales by invoices under several contracts extending through several months, and the answer admits these several contracts (pp. 3–7). It would seem from these allegations and admissions that the "special contracts" sued on were the contracts made at the time the invoices were sent out.

(3.) But, turning to the correspondence showing exactly what did occur in writing, thus constituting the *written contract* between the parties as to how the cotton should be paid for, *there is left no room for doubt but that there was an express written contract on the part of the defendant, through its agent Love, to pay for the cotton bought from the Wells Company.*

As an example taken from dealings during the season of 1899–1900, we refer to the letter of Wells Company to Love, November 8, 1899 (p. 114), in which they distinctly ask payment in money and to which he replies, on November 10 (p. 115):

"Buy our cotton as soon as possible and we will make arrangements about money and think we can get all we want at any time. Buy cotton and send us invoices and letters telling us what you are doing and expect to do and we will make our arrangements accordingly."

Here was a distinct promise on the part of the defendant, through Love, to pay for the cotton in money to the plaintiff just as the plaintiff might demand it, and the further correspondence during the season of 1899–1900 shows demands for remittances and payments by the defendant, with never a suggestion that there was any "special contract" whereby the money due for cotton was to be turned over in payment of the stock subscription of the Loray mills.

Again, for the season of 1900–1901 we find likewise promises on the part of the defendant to pay the plaintiff in money. Take, for example, the letter of Wells to Love, October 5, 1900 (p. 126), in which Wells writes:

"By the way, when there we failed to talk anything about how you wanted to pay for this season's purchases. Some time last spring you wrote that you were going to arrange with the National Surety Company of New York for your cotton this season. Please let us know about this and oblige."

To this Love replied on October 9, 1900 (p. 127):

"As to payments on cotton we wish to remit you promptly for our immediate wants and we are making arrangements with the National Surety Company to get the money when we commence storing cotton."

Here is a "special contract" as clear-cut as any lawyer could draw it and a distinct promise to pay the money.

Following this we find that on October 20, 1900, the Wells Company wrote Love (p. 127), inclosing invoice and saying:

"We are billing you this cotton at same price we are to others on whom we draw with B. L. attached, and we will thank you to remit us promptly else we will make actual loss on it."

It is now contended that this very invoice contained in this letter was sold under an agreement whereby a part of the proceeds were to be applied upon the stock subscription of W. L. Wells!

Again, Wells wrote Love on October 31, 1900, stating that he was shipping one hundred and fifty bales and saying:

"I suppose you will want us to carry this cotton until it arrives when you will reimburse us through your arrangements with the National Surety Company. Please let us know definitely about this that we know just what to say to our bank about it."

To this Love replied on November 3, 1900 (p. 130):

"We are arranging with the National Surety Company to get all the money you want and as you suggest you can arrange with your bank accordingly."

It is now contended in regard to this shipment that it was sold under a "special contract," whereby a part of the money due for it might be applied on the stock subscription of W. L. Wells, and that the plaintiff, by suing for the purchase-money of this cotton, sold under a distinct promise to pay the money, thereby ratified some prior indefinite agreement between W. L. Wells and John Love.

But most of the cotton that is in controversy in this action was bought under the order of John Love as result of the telegram of November 12, 1900 (p. 131), in which Love requested Wells to buy four or five hundred bales. These constitute the greater part of the invoices which have not yet been settled, and it is material to know what the "special contract" was under which this cotton was bought. We find this "special contract" contained in a letter from the Wells Company to Love, November 30, 1900, stating that they had bought the large lot of cotton desired, and then saying:

"Hope you have perfected your arrangements with the National Company and will be able to remit us promptly as the cotton is received, as it runs into money at a terrible rate, and it does not take long to get in very bad shape with our bank."

Here was a distinct stipulation in the contract that the actual money for the cotton was to be remitted as the cotton was received, and to this Love replied on November 17, 1900 (p. 132):

"On money matters we have perfected our arrangements and we are looking for a check today but it has failed to come and we expect it now the first of the week when we will make you a good remittance."

These two letters constitute the *written special contract* between the parties as to most of the invoices which were not settled, and we submit that it cannot be seriously argued that the plaintiff by suing for the purchase price of this cotton, sold under the terms set forth in these letters, is thereby ratifying the previous indefinite agreement between Love and Wells, as testified to by Love. If there ever was any such verbal agreement, then certainly it was revoked and annulled by this "special contract" in writing contained in these letters.

(4.) Apart from all this there is not a line of testimony that shows that when the Wells Company brought this action it had that knowledge of the nature of the contract between Love and Wells which was necessary before the bringing of the suit could be from any standpoint considered as a ratification. No lawyer will deny but that it was incumbent upon the defendant to show that at the time the plaintiff brought this action the plaintiff had full knowledge of all the terms of the alleged agreement between Love and Wells. It is not pretended that Love communicated the terms of this agreement to the plaintiff, but, on the contrary, he expressly admits that it was understood between him and Wells that it should be concealed from the plaintiff, and in pursuance of that agreement he marked all letters "Personal," which might otherwise have given the Wells Company some information. How, then, can it be gravely argued that the

company brought this suit upon the contract, of which the alleged agreement between Wells and Love was a part, when there is not a line of the testimony which shows that this vicious element of the contract was known to the plaintiff?

We have not overlooked the testimony of Love to the effect that, shortly prior to the commencement of this action, he said something to the plaintiff's attorney in regard to claiming the $50,000 credit, but it certainly could not be reasonably contended that this gave the plaintiff full notice of all the terms of the alleged agreement between John Love and W. L. Wells. So far as this testimony goes, it only discloses the fact that John Love was setting up some sort of claim, the nature of which was not fully explained, and the burden was certainly upon the defendant to show that the plaintiff had full knowledge of all the terms of the alleged agreement between John Love and W. L. Wells, including not only the agreement that the money due for cotton might be applied to W. L. Wells' subscription to stock, but also that the contract contemplated that W. L. Wells should supplant the Wells Company as purchasing agent for the three mills controlled by John Love.

For an authority directly in point upon this proposition we refer the court to Mechem on Agency, section 129, where it is said :

"Any ratification of an unauthorized contract in order to be made effectual and obligatory upon the alleged principal must be shown to have been made by him with full knowledge of all the material facts connected with the transaction to which it relates; and especially must it appear that the existence of the contract and *its nature and consideration were known to him.*"

In Trustees *vs.* Bowman, 136 N. Y., 526 (32 N. E., 988), the court said :

"But before a principal can be held to have ratified the unauthorized act of an assumed agent, he must have full

knowledge of the facts, so that it can be said that he intended to ratify the act. If his knowledge is partial or imperfect, he will not be held to have ratified the unauthorized act, and the proof of adequate knowledge of the facts should be reasonably clear and certain."

Under these authorities it was the duty of respondent to show that the Wells Company knew all the terms of the contract before any act on its part could constitute ratification, and it must be admitted that there is not a scintilla of evidence tending to show that John Love at any time before the commencement of this action gave the Wells Company information as to the nature and terms of its alleged agreement with W. L. Wells.

(5.) But conceding that the plaintiff brought this action with full knowledge of all the terms of the alleged agreement, and passing by the point that the cotton in question had already been used by the defendant and could not be recovered, we submit that the bringing of the action by the Wells Company for the purchase price agreed upon could not be held to ratify that part of the contract which was for the benefit of W. L. Wells individually, because with reference to this part of the contract it must be admitted that it was not made for or on behalf of the Wells Company, but for and on behalf of W. L. Wells individually.

We are not now controverting the proposition of law which holds that where a principal ratifies an act of his agent he ratifies it *in toto* and that he cannot accept that part which is beneficial to him and reject the part which is detrimental. These are rudimentary principles which cannot be contested. The case at bar, however, presents a very different phase of the question. It is sought by the defendant to establish the principle that where an agent sells the property of his principal for a fair and reasonable price and makes as a part of the contract a stipulation that his principal's money shall be applied to the payment of the agent's

individual obligation, that the principal cannot sue for the purchase-money without ratifying that part of the agreement which provided that the principal's money should be applied to the agent's individual debt. We submit that no authority can be found to sustain this proposition and for the very plain reason that so much of the contract as provided for the appropriation of the principal's money to the agent's private debt was not made on behalf of, nor for the benefit of, the company and was a stipulation which the party dealing with the agent was bound to have known did not bind the principal.

The only authority cited by the respondent upon this point is that of Shoninger *vs.* Peabody, 14 Amr. St. R., 88 (Conn.), but an examination of the concluding part of the opinion in that case will show that on the very point under discussed here the court sustained the view which we now seek to maintain. In that case the supreme court of Connecticut discussed a Vermont case which apparently conflicted with the ruling of the Connecticut court, and in its effort to reconcile the two opinions the court said:

"In regard, however, to the question whether the suit would be effectual as a ratification of their agent's act, we suggest this distinction: that the act of the agent in paying his private debt with the plaintiff's goods could not, perhaps, be regarded as an act done for or in behalf of the principals at all, nor even in the principals' name, and was not properly a contract of sale at all, so that there was no express contract to be affirmed by the bringing of the suit, and nothing to prevent the raising of the implied promise except the fact that the defendant had not sold the goods and received money thereon. It is undoubtedly a sound doctrine, established by numerous authorities, that to make a ratification effectual it must be of some act done or engagement made as agent for or on behalf of the person whom it is alleged to bind."

Here, from the leading and practically only authority cited by the respondent, we find a clear statement of the rule of

law applicable to our case, and under this decision it is plain that the agreement by which the Wells Company's money was to be applied in payment of the stock subscription of W. L. Wells, coupled with the inducement held out by John Love, according to his own testimony (R., bottom of p. 66), that W. L. Wells was to supplant the Wells Company as purchasing agent of the three mills, could not be held to be an agreement made for or on behalf of the Wells Company, and therefore the suing for the purchase-money could not in any sense ratify this part of the agreement.

In connection with this case of Shoninger *vs.* Peabody, relied upon by respondent, we wish to call the attention of the court to the second opinion of the supreme court of Connecticut when the case went back to that court. It will be found reported in 59 Conn., 588, and the second opinion shows what explanation the court gave of its former ruling, and, we submit, it adds strength to our argument. In addition to that, we refer to the case of Stewart *vs.* Woodard, 50 Vt., 78 (28 Am. Rep., 488), in which plaintiff sued the defendant for the price of a suit of clothes, and the defendant plead that the agent of the plaintiff had agreed that the price of the suit might be applied in payment of the agent's medical bill. The court said:

"The defendant purchased the goods sued for and attempted a mode of payment which he was bound to know was unauthorized. He has had the goods and converted them to his own use, never having paid the plaintiffs for them. The implied promise arising from taking the benefit of the delivery of them is sufficient to warrant recovery in this action."

And in Gould *vs.* Blodgett, 61 N. H., 115, it was held that an action of assumpsit against a person for whom the agent has delivered his principal's property in payment of his own debt is not a ratification of the unauthorized delivery.

(6.) But conceding everything claimed by the defendant with regard to the bringing of this suit upon the "special contract," it still remains that the suit was no ratification of the unlawful agreement between Love and W. L. Wells, because at the time that this was found out the cotton had already been used by the defendant, and the Wells Company could not have repudiated the contract and saved itself whole. The defendant admits in its answer that the cotton was bought at the prices claimed in the complaint. This cotton has been consumed in the mills of the defendant. The plaintiff did not know of the unlawful and wrongful contract made between Love and W. L. Wells until after the cotton had been used. What could the plaintiff do except to sue for the purchase price of the cotton about which there is no dispute? There was no other alternative except to abandon its claim. The doctrine of ratification presupposes that the principal has his election either to ratify or disaffirm the contract of the agent and at the same time save himself whole.

This contention of the defendant is but a part of the position taken by the defendant that the receipt and retention of benefits under a contract ratifies it, and we shall presently cite numerous authorities showing that this principle of law does not apply to the proposition that we are here discussing. We refer the court to a case which is directly in point. In Cooley *vs.* Perrine, 12 Vroom, 322 (32 Am. Rep., 210), plaintiff brought a suit upon a note given for a horse and the defendant pleaded that the plaintiff's agent had made a contract of warranty and claimed damages for breach of the warranty. The plaintiff denied the authority of his agent to make the warranty, and the defendant contended there, just as in the case at bar, that the bringing of the suit upon the note ratified the act of the agent. In the meantime the horse had died, and this, of course, prevented the plaintiff from rescinding the contract. In the course of the able opinion the court says :

"Sometimes it has been intimated that a distinction might be based upon whether the warranty by the agent were set up by a plaintiff to maintain a suit against the principal, or by a defendant to resist the principal's suit for the price, and that the attempt of the principal to collect the price, after he has learned of the warranty, is a ratification of it. On the idea that the authority does not cover the warranty, and that the purchaser is chargeable with knowledge of the authority, it is not plain how he can withstand the vendor's claim on a contract made, by alleging a contract which he knew was not made. But if there be anything at all in the distinction, it must be confined to those cases where, when the principal obtains knowledge of his agent's unauthorized warranty, the sale is *in fieri*, or can be declared void and the parties restored to their original position. What the principal does in pursuance of a bargain which he has authorized his agent to make, without knowledge that his agent has entered into an unwarranted contract, is not a ratification of such contract (Coombs *v.* Scott, 12 Allen, 493; Smith *v.* Tracy, 36 N. Y., 79; Titus *v.* Phillips, 3 C. E. Green, 541; Gulick *v.* Grover, 4 Vroom, 463). *And if, when he acquires knowledge, he cannot, in justice to himself, disavow the whole of his agent's contracts, he is entitled to stand upon what he authorized, and repudiate the rest; the purchaser, who dealt with a special agent without noting the bounds of his power, must suffer rather than the innocent principal.* (Bryant *v.* Moore, 26 Me., 84). These views are not at all in conflict with the class of cases which hold that the principal is responsible for the fraud or deceit of his agent, committed in the course of his employment, for his employer's benefit."

We also refer the court to the cases cited under the next succeeding proposition as being directly in line with foregoing authorities.

Eighth Proposition: Conceding that the Wells Company obtained benefits from the alleged agreement and retained these benefits after knowledge of the contract, this retention of benefits would not amount to a ratification under the circumstances of this case.

We submit that it is too plain for discussion that the Wells Company received no benefits from the alleged agreement between W. L. Wells and John F. Love. We have endeavored in a former part of this brief to point out the fact that not a bale of the cotton in controversy was sold as a result of or in consideration of the making of the agreement between Love and W. L. Wells. Love nowhere states in his testimony that he purchased this cotton now in controversy in consequence of the agreement between Wells and himself. In truth, the undisputed facts show that the alleged agreement instead of being a benefit to the Wells Company was intended to take away from it the right to sell cotton to Love's mills, because it contemplated that W. L. Wells individually should buy the cotton for the mills. Conceding, however, that the Wells Company received benefits from the contract, we submit that this retention of benefits did not ratify the alleged unlawful agreement between Love and W. L. Wells whereby the money of the Wells Company should be taken to pay the individual debt of W. L. Wells.

(1.) If any benefits were received by the Wells Company from the contract the evidence all shows that at the time the benefits were received the company was in absolute ignorance of the illegal part of the agreement, viz., that part of the contract which permitted the money of the Wells Company to be applied to W. L. Wells' individual debt. Love was bound to have known that this was an unlawful agreement and one that W. L. Wells had no power to make. Therefore it does not lie in his mouth to say that the Wells Company cannot repudiate that part of the agreement which

he had no right to rely upon, and which he was bound to know the Wells Company was ignorant of. This doctrine is tersely stated in the case of Bloomfield *vs.* Charter Oak Bank, 121 U. S., 138, as follows:

"Any ratification of an act previously unauthorized, must in order to bind the principal be with full knowledge of all material facts and no estoppel *in pais* can be created, except by conduct which the person setting up the estoppel *has the right to rely upon*, and does in fact rely and act upon."

Every essential principle announced in the decision just quoted is present in the case at bar. The Wells Company did not have full knowledge, and Love had no right to rely upon the alleged unlawful agreement.

In Bell *vs.* Cunningham, 3 Pet., 69, this court held that the retention of benefits by a principal would not ratify the acts of the agent unless the principal had full knowledge of the terms of the contract.

A very full and exhaustive discussion of this question will be found in the leading case of Smith *vs.* Tracy, 36 N. Y., 79, where the court says:

"When a party claims, receives and retains the property of another, knowing that it was obtained by an unauthorized use of his name, it is a ratification of the assumed agency, which evinces his assent to the contract or the wrong. The courts, however, have been careful in the leading cases of that class, to note, as the precise ground of legal liability, the knowledge of the facts by the party appropriating the benefit (Murray *v.* Binninger, 36 N. Y., 61; Fitzhugh *v.* Sackett, *id.*; Bank of Beloit *v.* Beale, 34 *id.*, 473, 475; Keeler *v.* Salisbury, 33 *id.*, 653; Farmers' Loan & Trust Co. *v.* Walworth, 1 *id.*, 446; Palmerston *v.* Huxford, 4 Denio, 166, 168). So, when a party takes the benefit of an unauthorized loan or purchase, obtained on his credit by his known servant or employee, it is held that his subsequent adoption of the transaction is equivalent to an original authority (Bolton *v.* Hillersden, 1 Ld. Raym., 224; Precious *v.* Abel, 1 Esq., 350; Rimell *v.* Sarpayo, 1 Carr & Payne, 254). The cases on which the respondent mainly relies, are those

in which it has been held, that when an authorized agent, *acting within the scope of his authority*, perpetrates a fraud, for the benefit of his principal, and the latter receives the fruits of it, he is liable for his own wrong (Bennett, Judson, 21 N. Y., 238; Elwell *v.* Chamberlain, 31 *id.*, 611). These authorities rest upon the principle, that when a party clothes another with authority to speak in his behalf, and indorses him to the third persons as worthy of trust and confidence, those who are misled by the falsehood and fraud of the agent are entitled to impute it to the principal. The latter will not be permitted to retain the fruits of a transaction infected with fraud, whether the deceit, which he seeks to turn to his profit was practiced by him or by his accredited agent. In such a case, he cannot separate the legal from the illegal elements of the contract, and appropriate the advatages it secures, while he rejects the corrupt instrumentalities by which they were obtained. But when, as in the present case, there is a mere special authority to sell particular property, of a kind not usually sold with warranty, the buyer, who alleges a warranty by the agent, must show that the engagement was one he was empowered to make in behalf of his principal. The receipt of the proceeds of the sale, in ignorance of any such undertaking, is neither an assent to the breach of duty nor an extension of the authority of the agent. The question is one as to the existence and extent of the power, and not as to a fraud practiced by an agent acting within the scope of his authority. * * * In the case before us, it is claimed that the receipt by the testator of the proceeds of an authorized sale, is to be deemed an adoption of a contract, made without his authority, and to which he never knowingly assented. Such a ruling would be subversive of well-settled legal principles, and would open the door to illimitable frauds by brokers, factors, attorneys and others, clothed with limited powers and occupying strictly fiduciary relations (Owings *v.* Hull, 9 Peters, 608, 629; Bell *v.* Cunningham, 3 *id.*, 69, 76, 81; Brady *v.* Todd, 99 Eng. Com. Law, 591, 601, 605; Freeman *v.* Rosher, 66 *id.*, 787; Seymour *v.* Wyckoff, 10 N. Y., 213). In the language of Judge Story, in the first of these cases, 'No doctrine is better settled, both upon principle and authority, than this; that the ratification of an act of an agent previously unauthorized, must, in order to bind the principal, be with a full knowledge of all the material facts.'"

Also in the case of Baldwin *vs.* Burrows, 47 N. Y., 199, the same learned court, after adverting to the well-established doctrine that a principal "by adopting a contract made for him and receiving and retaining the fruits as belonging to him by virtue of that contract, assumes responsibilities for the instrumentalities which the agent may have employed in his behalf to effect the contract," then draws this well-defined distinction:

"It must be observed, however, that even this responsibility for instrumentalities does not extend to collateral contracts made by the agent in excess of his actual or ostensible authority, and not known to the principal at the time of receiving the proceeds, though such collateral contracts may have been the means by which the agent was enabled to effect the authorized contract, and the principal retain the proceeds thereof after knowledge of the fact (Smith *v.* Tracy, 36 N. Y., 79; and see Hammond *v.* Michigan State Bank, Walker's Ch. R., 214; Young *v.* White, 7 Beav., 506). A party dealing with an agent is bound to inquire as to the extent of his authority; but he cannot always protect himself against his frauds. The cases in which it is held that, if the principal ratifies and enjoys the benefit of part of a contract, he cannot repudiate the rest, refer to an intentional ratification with knowledge of all that has been done."

In Wheeler *vs.* Northwestern Sleigh Co., 39 Fed., 347, the agent of the plaintiff had sold certain stock which belonged to the plaintiff, and had made an unauthorized stipulation as a part of the contract of sale that the accrued dividends should pass to the purchaser. The court said:

"Did the retention by the plaintiff of the avails of the stock amount to a ratification? The plaintiff received as avails of the stock the exact amount for which he had authorized his agent to dispose of his stock. He had no reason to suppose that any false representation had been made, or that his agent had assumed to dispose of any other property than the stock as the consideration for the money paid by the purchasers and received by him. Under such circumstances, the retention of the money cannot be held to be

a ratification by him of the unauthorized acts of the agent, because it was retained without knowledge of the facts. * * * The purchaser was bound to inquire into the authority of the agent in such case. The reception and retention of the exact sum authorized to be taken for the house, in ignorance of the act of the agent with respect to the bank stock, is no ratification. Otherwise the principal is bound for every unauthorized act of the agent, and the purchaser may trust the agent, who can exhibit no authority. Such a principle would be ruinous."

In Roberts *vs.* Rumley, 58 Iowa, 301 (12 Northwestern, 323), discussing the very point in controversy, the court says:

"It is further claimed that the defendants cannot avail themselves of the benefits of the acts of their agents without also being bound by whatever may be prejudicial to them. This principle applies to the doctrine of agency, with some limitations and qualifications. If the agents had incorporated in the mortgage a provision that the proceeds of the mortgaged property should first be applied to the satisfaction of the judgment upon which Roberts was surety, the defendants could not have accepted the benefits of the mortgage without being bound by this condition, even although the agents had no authority to agree to such condition. So, too, if the defendants had known that their agents had agreed to incorporate such a condition in the mortgage, and that it was omitted by mistake, they would, probably, on acceptance of the mortgage, have been bound by the condition. But to hold that the principal is bound by agreements between the special agent and the person with whom he contracts, not authorized by the agent's appointment, and of which he had no knowledge when he accepted the benefits of the contract, would be entirely subversive of the whole doctrine of special agency, and instead of requiring the person dealing with the agent to ascertain at his peril that the agent has kept within his special authority, would require the principal to inquire at his peril whether the agent had gone beyond it."

For another able opinion, in which the authorities are reviewed, we refer to the case of Nichols *vs.* Bruns, 4 Dak., 34 (37 N. W., 752).

(2.) But the retention of benefits by the Wells Company (if any there were) under the circumstances of this case could not in any event be taken as a ratification for the reason that at the time that the company was informed of the vicious or unlawful element in the alleged contract it could not surrender the benefits that it had received and at the same time save itself harmless. The Wells Company could not repudiate the transaction and recover back its cotton, because it had already been used in the mills of the defendant, and there was nothing else that the company could do except to claim the purchase-money which the defendant had agreed to pay. Under these circumstances the Wells Company had the right to repudiate that part of the agreement which was unauthorized and stand upon the valid terms of the contract, because if any loss is to be suffered it must be suffered by the party who dealt with the agent, knowing that he was transcending his authority. The following cases abundantly sustain the position which we have taken:

In Bryant *vs.* Moore, 45 Am. Dec., 96, it is said:

"There is no doubt that if one person knows that another has acted as his agent without authority, or has exceeded his authority as agent, and with such knowledge accepts money, property or security, or avails himself of advantages derived from the act, he will be regarded as having ratified it. This will not be the case, when the knowledge that the person has exceeded his authority is not received by the employer so early as to enable him, before a material change of circumstances, to repudiate the whole transaction without essential injury. If, for instance, a merchant should authorize a broker by a written memorandum to purchase certain goods at a price named, and the broker should exhibit it to the seller, and yet exceed the price, and this should be made known to the merchant when he received the goods; if he should retain or sell them, he would ratify the bargain made by the broker, and be obliged to pay the agreed price. But if he had received the goods without knowledge that they had been purchased at an advanced price, he would not be obliged to restore them, or pay such advanced price, if he

could not, when informed of it, repudiate the bargain without suffering loss. In such case he would not be in fault. The seller would be, and he should bear the loss."

In Cooley *vs.* Perrine, 32 Am. Rep., 210, it is said:

"What the principal does in pursuance of a bargain which he had authorized his agent to make, without knowledge that his agent has entered into an unwarranted contract, is not a ratification of such contract. And if, when he acquires knowledge, he cannot, in justice to himself, disavow the whole of his agent's contracts, he is entitled to stand upon what he authorized, and repudiate the rest; the purchaser, who dealt with a special agent without noting the bounds of his power, must suffer rather than the innocent principal."

In Martin *vs.* Hickman, 41 S. W., 852, the court said:

"The principal will not be considered as having ratified an unauthorized act of his agent merely because he receives property and avails himself of the advantages derived from such act, when he did not learn that such agent had exceeded his authority until after he had sold the property, and after the circumstances were such as to put it beyond his power to return or restore the property. * * * Martin could not restore the property, for he had already sold it before learning of the unauthorized act of his agent, Clary. His failure to restore or return the property under such circumstances cannot be treated as a ratification, so as to make him liable for the unauthorized promise of Clary. The evidence on this point was not sufficient to sustain the verdict."

In Swayne *vs.* Ins. Co., 49 S. W., 518, it is said:

"Nor can it be said under the circumstances that the company would be bound on account of the alleged ratification in accepting the benefits of the service rendered by appellant. It was not within its power, after the service had been rendered, to reject such benefits. Ratification as a result of taking the benefits of an unauthorized transaction implies the power of election to take or not to take; that is to say, when the principal discovers that the agent has exceeded his authority, he cannot then, without being bound, hold on to

benefits derived from the unauthorized transaction, when it is within his power, by a repudiation of the unauthorized act, to restore such benefits to the one from whom they have been acquired."

Ninth Proposition: The undisputed evidence shows that there was no actual ratification by the Wells Company; and whatever inferences of ratification might have been drawn from the failure of the Wells Company to demand money were fully explained and rebutted by the direct, positive, and uncontradicted testimony of J. T. Wells, and in this state of the evidence it was the duty of the circuit judge to direct a verdict for plaintiff.

It will be noted that the sole ground upon which the defendant's counsel claim that this case should have gone to the jury is that after the Wells Company received the letter of the 31st of August, 1900, containing the endorsement ("Loray Mill stock $10,000—we want to see your Mr. Wells about it") the company did not thereafter make demand for this specific sum, and, further, that after the letter which Love wrote to W. L. Wells of February 2, 1901, informing W. L. Wells that he had paid in his $50,000 and requesting him to have the Wells Company credit Love's house with that amount there was no demand for several months. We have already discussed these facts fully in the foregoing part of the brief and desire now merely to call attention to certain authorities bearing directly upon them.

The question before Judge Boyd was whether there was any evidence of ratification sufficient to warrant the jury in so finding. The defendant relied solely upon *inferences* to be drawn from a failure on the part of the plaintiff to make demand. The defendant does not contend that this neglect or failure to demand payment was in itself a ratification, but

the contention is that the jury would have been warranted in drawing the *inference* from this fact that the plaintiff had actually with knowledge ratified the transaction. Over against this inference, taken in its strongest light for the defendant, we have *the clear, convincing, uncontradicted testimony of John T. Wells* to the effect that the company did *not* have knowledge of the transaction and did *not* ratify it. The question, then; was whether the judge below should have allowed the jury to find from mere *presumption* or *inferences* that a certain fact existed when the *clear and uncontradicted* testimony of a credible witness showed conclusively that it did not exist. The authorities are conclusive.

In case of Fresh *vs.* Gilson, 16 Pet., 327, the plaintiff contracted with the defendants to build a culvert on a canal for a stipulated sum. Afterwards the plaintiff sublet all or a part of the work to one Barret. After the work was finished the plaintiff brought suit against the defendants upon the contract and the defendants offered to prove and the judge in the circuit court allowed them to prove that they had paid certain orders drawn on them by the subcontractor, Barret, and the jury was allowed to find these as a credit in favor of defendants against the plaintiff. It seems that it was shown in evidence that in several statements of account that had passed between the plaintiff and defendants, orders which Barret had drawn upon the defendants were allowed and from this fact the defendants argued that there was a *presumption* or that the jury might be entitled to draw the *inference* that the defendants had authorized Barret. There was, however, direct and positive proof that the plaintiff had never authorized Barret to draw orders on his account, and the question before the court was whether the *presumption* or *inference* from the conduct of the parties rendered these orders drawn by Barret competent evidence to go to the jury in the face of the *positive proof to the contrary*. The Circuit Court allowed the evidence to go to the jury, but the

Supreme Court reversed this ruling and in the course of the opinion said:

"We are unable to perceive upon what correct legal principle this question was ruled as it has been by the Circuit Court. There is no express power apparent in the record; nor indeed was any attempted to be shown in the proofs, existing in Barret, to bind Fresh for any amount with any person. * * * Nor is it perceived that the admission of these orders was warranted by any presumption arising from the fact that orders previously drawn by the same person were comprised in the account proved to have been presented by Fresh, and not objected to by him, except as to the quantity of cement charged therein. Liability for the acts of others may be created either by a direct authority given for their performance, or it may flow from their adoption, or, in some instances, from acquiescence in those acts. *But presumptions can stand only whilst they are compatible with the conduct of those to whom it may be sought to apply them; and still more must give place when in conflict with* CLEAR, DISTINCT, AND CONVINCING PROOF." (Italics ours.)

But we submit for the consideration of the court a case directly in point and presenting even a stronger phase of the question than that afforded by the case at bar. We refer to Hurley *vs.* Watson, 68 Mich., 532 (36 N. W. Rep., 726). In this case the plaintiffs were dealers in coal, and had an employee, one Clark, who appears to have occupied the position of general manager, selling coal, making settlements, and making entries in plaintiffs' books. The defendant owned a drug store and certain houses, which he rented. The plaintiffs' agent, Clark, sold the defendant coal for six or seven years and credited the account of the books with the amount of house rent and the drug bill due from the agent to the defendant. After the agent left the employment of the plaintiffs they discovered what had been done and brought suit against the defendant for the entire amount of coal that had been sold during the six or seven years, although the books had been balanced from time to time, and the books showed only a small amount due. The plaintiffs testified

positively that they had not authorized their agent, Clark, to pay his individual drug bill and house rent out of the money due them by defendant for coal. The defendant contended that from the course of dealings that had been going on and the entries in the books of the plaintiffs and the long time that the transactions had been continued the jury were warranted in drawing the inference that the plaintiffs had either authorized it or ratified it, and that the jury should be allowed to find this fact, notwithstanding the clear and uncontradicted testimony of the plaintiffs that they had not authorized it and had not ratified it. Under this state of the evidence the plaintiffs' counsel requested the judge who tried the case to direct a verdict for the plaintiffs, but he refused to do so and left the matter to the jury to say whether the direct testimony of the plaintiffs or the inference and presumption to be drawn from the facts should prevail. *On appeal the Supreme Court of Michigan held that the judge below erred, and that he should have directed a verdict for the plaintiffs.* The case covers every point in the case at bar so completely that we give here a full extract from the opinion:

"The law is well settled that a person who deals with an agent is bound to inquire into his authority, and ignorance of the agent's authority is no excuse. The authority of an agent to collect money for his principal does not authorize him to receive anything but money in payment from the debtor. The principal may be careless in reposing confidence in his agent, yet this does not make him liable to a third party, who, in dealing with such agent, fails to exercise the diligence usual with good business men under the circumstances. If there is anything likely to put a reasonable business man upon his guard as to the authority of the agent, it is the duty of the third party to inquire how far the agent's acts are in pursuance of the principal's limitation. As illustrated by Mr. Wharton, in his work on Agency, § 137, wherein he says: 'I may be careless in exhibiting confidence in an agent, yet this does not make me liable to a third party, who, in dealing with such agent, fails to apply the diligence usual with good business men under the circumstances. The case becomes in such a view one of what is

called "contributory negligence;" in other words, the casual connection between my negligence in giving color to the employment of A., and B.'s loss by dealing with A., is broken by B.'s own negligence in trusting A. without due inquiry.' The duty of the defendant to make inquiry in this case, notwithstanding the apparent general management of plaintiffs' business by Clark, is conclusively established by another well-recognized principle of law, and that is that a party dealing with an agent who has general authority to sell goods or collect debts, is bound to know that the agent has no authority by virtue of his agency to apply or offset his own private debt to such third party in payment of the debt to the principal. (Cases cited.) No overweening confidence of the principal in the agent can excuse the duty of the third party to ascertain whether the agent has authority from his principal to pay the agent's debts in that way. It is presumptively a violation of the agent's authority, and a fraud upon his principal, and the party collecting his debt from the agent in that way participates in the fraud, and cannot shield himself behind any presumed or implied authority of the agent, because none exists in such case. The party so dealing takes upon himself the burden of showing an express authority in the agent or ratification of the transaction by the principal. It is not pretended that there was any express authority given by plaintiffs to Clark to apply the rent and account due from him to defendant in payment for coal due from defendant to plaintiffs. There can be no ratification of an act of an agent without full knowledge of the facts which it is claimed are ratified. There was no evidence that plaintiffs ever had any knowledge of the dealings between defendant and Clark until after Clark left their employment. The first information the plaintiffs claim to have received was from defendant after the dealings in controversy had ceased. But it is claimed on behalf of defendant that plaintiffs must be held to have had knowledge of the contents of their books of account, and that the fact that those books contained an account with defendant for coal purchased from time to time from 1880, and credits therefor, so that a small balance only remains due to plaintiffs by said account, and the further fact that those books contain an account wherein Clark is charged with the amount collected of defendant, is evidence from which the jury may infer that the plaintiffs knew

of the manner of dealing between Clark and defendant, and, not objecting to such dealing, it may be further inferred that they intended to and did ratify the same. Both of the plaintiffs testified positively that they never knew that such accounts stood upon their books before Clark left, and that they had never examined their books of account. The circuit judge instructed the jury that 'Clark's position with the Hurleys, the dealings and settlements between Clark and Watson occurring as they did, the lapse of time ensuing without complaint or objection by the Hurleys, the dealings and settlements between Clark and Watson having been recorded, if you find that they were recorded, as they from time to time occurred in the regular book of the Hurleys, to which they could have full and daily access, and which were in ordinary use in their business, raises the presumption that the Hurleys knew and approved of said settlements. It is not conclusive, but it raises the presumption. You should take into account all the other testimony, and arrive at your own conclusion from the whole. The burden is upon the Hurleys to establish the invalidity of the dealing. The presumption that the Hurleys knew of and approved of the transaction between Clark and Watson is not rebutted by the assertion of the Hurleys that they knew nothing of them, if the jury are satisfied from the evidence that the Hurleys did not exercise reasonably prudent supervision or oversight over their business, and thereby failed to know or discover the course their own affairs were taking. You have heard all the facts, gentlemen. Counsel have embodied requests in writing, and I do not desire to comment upon the testimony. Take all the testimony in the case into consideration, Mr. Hurley's testimony regarding his knowledge of what was going on, and all the transactions and presumptions that he should have known, and, in the ordinary course of dealings, if you believe his books contained the record of them, all the facts and circumstances together, as I have expressed it, and give it that careful consideration which it deserves, and your verdict will no doubt be satisfactory.'

"If the plaintiffs knew of the manner of dealing between Clark and Hurley, and kept silent and suffered it to go on without objection for the length of time shown in the testimony, the jury would have been warranted in finding that they had ratified that course of dealing. But there must be

evidence tending to prove such knowledge. There is a presumption that a person is cognizant of the contents of his own books of account. The probative force, however, of this presumption may be strong or weak, as the circumstances may show that the party made the original entries, or that they were made by a clerk or book-keeper, and may be entirely overcome and disproved by the positive testimony of the party, uncontradicted, that the accounts were kept and entries made by a book-keeper or clerk, and had never been examined by him, and that he had no knowledge thereof. As was said by Mr. Justice Daniel, in Fresh *v.* Gobson, 16 Pet. 330: 'Liability for the acts of others may be created either by a direct authority given for their performance, or it may flow from their adoption, or, in some instances, from acquiescence in those acts. But presumptions can stand only whilst they are compatible with the conduct of those to whom it may be sought to apply them; and still more, must give place when in conflict with clear, distinct, and convincing proof.' The circuit judge erred when he instructed the jury that 'the burden is on the Hurleys to establish the invalidity of the dealing.' This is apparent from the principles above laid down relative to the duty of one dealing with an agent. He also erred in charging the jury that 'the presumption that the Hurleys knew of and approved the transaction between Clark and Watson is not rebutted by the assertion of the Hurleys that they knew nothing of them.' Under the circumstances of this case, there is no ground for saying that plaintiffs are estopped by their negligence in not exercising a more vigilant supervision and oversight over their business, and thereby failing to discover the course their own affairs were taking. Their negligence did not excuse defendant from ascertaining whether Clark was authorized to pay his own debts in the coal of plaintiffs, or justify the defendant in participating in so palpable a breach of duty on the part of the agent. The proofs show that plaintiffs knew that the defendant was dealing with them, but there is nothing to show they had any notice that such dealing was other than in the ordinary way. The proofs also established the fact that the plaintiffs paid their men regularly twice a month, including Clark. What, then, was there to raise a suspicion in their minds that Clark was charging coal sold to defendant to his own account upon the books of the plaintiffs? The burden of proof was

upon the defendant to show ratification; and generally it is a question for the jury whether silence affords a reasonable presumption of ratification under the circumstances of the particular case, and will depend very much upon the question whether the party dealing with the agent had reason, from the course of previous dealing, or from the circumstances of the case, including the fact that the principal had notice or knowledge of the assumed authority of the agent in the dealing, to suppose that the principal would inform the party if he intended not to ratify the act, and whether his delay and silence, after such notice or knowledge, are or are not a fraud upon the other party. In this case the record does not disclose in what manner defendant was defrauded by the silence of the plaintiffs even if it should be conceded that they had notice and said nothing. It is to be presumed that defendant bought no more coal than he needed for use. It is not shown that he paid a larger price for it because he could turn it upon account against Clark in the way he did. It does not appear that Clark has absconded, or that he was or is insolvent. Defendant testifies that he would as soon have paid the money for the coal, and offered to do so, but that Clark suggested to apply it upon rent due from him to defendant. If Clark had no authority to receive anything but cash in payment for coal sold to defendant, and defendant is now obliged to pay plaintiffs for such coal, Clark's debt to defendant is not discharged. He is still liable, and the defendant, so far as this record discloses, loses nothing. It is not like the cases where the principal has received a benefit from the transaction which he retains, and where he will not be permitted to repudiate the authority after accepting and retaining the benefit derived from the transaction."

As showing the striking parallel between the case above cited and the one at bar, we call attention to the fact that in our case the defendant Love still has his cause of action, if any, against W. L. Wells for the $50,000. It is shown from the evidence that W. L. Wells is abundantly solvent, and hence there can be no wrong done in relegating the defendant or its agent, Love, to an action against W. L. Wells to recover any amounts that may have been paid on his account.

Tenth Proposition: The diversion of $50,000 of the funds of the W. L. Wells Company in payment of subscription to stock in the Loray mills was ultra vires, whether the stock was intended for the W. L. Wells Company or for W. L. Wells individually.

In the previous discussion of the questions involved in this case we have, for the sake of the argument, taken it for granted that the alleged agreement relied upon by the defendant was one that the Wells Company, as a corporation, could have made. We submit, however, that it is susceptible of demonstration to the satisfaction of the court that the alleged agreement was *ultra vires* of the plaintiff corporation. Admitting that there was an agreement between Wells and Love to apply the purchase-money of cotton in payment of the stock of the Loray mills, and admitting that this agreement was not revoked by the subsequent letters and writings between them, we still maintain that such a contract is *ultra vires of* the W. L. Wells Company. This is true if the stock of the Loray mills was to become the property of the Wells Company, and for a stronger reason it is true if the agreement contemplated that the funds of the Wells Company to the amount of $50,000 should be diverted into paying W. L. Wells' individual subscription.

When is a contract *ultra vires* of a corporation?

It would only seem necessary to cite the opinion of Judge Simonton in Safety Wire Company *vs.* Mayer, 74 Fed. Rep., 363, quoting with approval Central Trans. Co. *vs.* Pullman Car Co., 139 U. S., 24, as follows:

"Upon the authority and duty of a corporation to exercise the powers granted it by the legislature and those only, and upon the invalidity of any contract made beyond their powers or providing for their disuse or alienation, there is no occasion to refer to decisions of other courts, because the judgments of this court, especially those delivered within the past twelve years by the late Mr. Justice Miller, afford satisfactory

guides and ample illustrations. After collaborating and discussing these cases, the general principle is stated that contracts of a corporation beyond the scope of powers enumerated in its charter (read in the light of any general laws which are applicable) and other powers not fairly incidental thereto, are unlawful and void."

In the recent and valuable work of Clark & Marshall on Corporations, vol. I, sec. 205, we find the following:

"When properly used, the words '*ultra vires*' as applied to the act of a corporation, mean simply an act which is beyond the powers (*ultra vires*) conferred upon the corporation by its charter, as distinguished from an act which is authorized by its charter. The act need not necessarily be expressly prohibited by the charter or by any other statute. Nor need it be in any sense immoral or injurious to others. It may be an act which could be lawfully done by a natural person. It may be even praiseworthy as in the case of a gift by a corporation for charitable or religious purposes. Yet, if it is not authorized by the corporation, it is *ultra vires*. In other words, an *ultra vires* act by a corporation, in the proper sense, is simply an unauthorized act."

In support of this definition this learned author cites with approval the case of Whitney Arms Co. *vs.* Barlow, 63 N. Y., 62; 20 Am. Rep., 504, in which is given a clear definition of an *ultra vires* contract as follows:

"When acts of corporations are spoken of as *ultra vires*, it is not intended that they are unlawful or even such as the corporation cannot perform, but merely those which are not within the powers conferred upon the corporation by the act of its creation, and are in violation of the trust reposed in the managing board by the shareholders, that the affairs shall be managed and the funds applied solely for carrying out the objects for which the corporation was created."

Now, let us consider the contract in the light in which it is treated by defendant. It is alleged in the answer of defendant that this contract contemplated that the stock in

the Loray mills should be taken for the benefit of W. L. Wells Company.

We understand it to be admitted by defendant that it is an *ultra vires* contract where one corporation deliberately invests its funds in the stock of another corporation; but it is contended that in this case the taking of the stock was merely *incidental* to the purchase of cotton. Let us see whether it was an *incidental transaction* or a deliberate *investment*. In defendant's answer (p. 8) it is alleged that it was agreed between Love and Wells that "a portion of the purchase-money due for the said cotton might be *invested in the stock of the said proposed manufacturing plant*, which was known as the Loray mills." There the defendant gives deliberately its understanding of the agreement, which was that this cotton money should be *invested* in the stock of the Loray mills. It would seem to be sufficient to stop with this statement because it clearly avers an investment and not an incidental transaction.

But apart from the answer it is a most astounding proposition that it is merely incidental to the business of a corporation for it to agree to accept $50,000 of stock of another corporation in payment of cotton sold—five times its capital stock invested in the stock of another corporation—and yet call this an *incidental transaction!*

In Cal. Nat. Bank *vs.* Kennedy, 167 U. S., 362, it was distinctly held that it was *ultra vires* of one corporation to purchase stock of another. In First Nat. Bank *vs.* Nat. Ex. Bank, 92 U. S., 123, speaking of the power of one corporation to take stock in another, the court says:

"Dealing in stocks is not expressly prohibited, but such a prohibition is implied from the failure to grant the power. In the honest exercise of the power to compromise a doubtful debt owing to a bank, it can hardly be doubted that stocks may be accepted in satisfaction with a view to their subsequent sale or conversion into money so as to make good or reduce an anticipated loss."

But as this is a Mississippi corporation, its powers are to be construed in the light of the laws of that State, and in Woodbury *vs.* McClurg, 78 Miss., 831 (29 So. Rep., 514), decided by the Supreme Court of Mississippi in March, 1901, we find the following:

"And a corporation created under chapter 25, Code 1892, can only exercise the powers prescribed by that chapter. By that chapter it is clear that every corporation is intended to be a separate and distinct entity, and reading, in the light of our statutes and the principles of common law relating to corporations, the first clause of section 5, chapter 88, Acts 1900 (the anti-trust law), we construe it to mean, as therein expressly declared, that *no corporation shall directly or indirectly purchase or own capital stock, or any part thereof, of any corporation; and that, too, without any question of competition between them.*"

It would seem plain, then, that whatever the law may be elsewhere with regard to this Mississippi corporation it must be assumed that any act on its part in attempting to procure the stock of another corporation was *ultra vires*.

In one of the cases above cited from the Supreme Court of the United States it is said that it is not *ultra vires* of one corporation to take the stock of another one in a *bona fide* effort to secure a debt and with a view to selling the stock. This is what the courts mean when they say that a corporation may take stock in another corporation whenever it is a mere "incident" in the regular course of business, but in the case at bar no one can contend that this transaction was merely an *incident* in the regular course of business. The contract, if made at all, was not made for the purpose of enabling the Wells Company to dispose of some property which it had on hand, but it referred to cotton that the Wells Company should thereafter purchase and sell to the defendant, and that, as the answer says, "a portion of the purchase-money due for the said cotton might be invested in the stock, etc."

If the Wells Company had agreed to invest a part of the money which it had on hand in purchasing stock from the Loray mills, in consideration that the Loray would allow the Wells Company to sell it cotton, this would be admittedly an *ultra vires contract*, but it is now contended that the Wells Company had the power to agree that if the defendant would allow it to sell cotton, a part of the purchase-money might be invested in the stock of the mill, and that this contract would be legal and a mere incident to the business. We submit that this is a distinction too fine to be appreciated.

But we have argued the question upon the assumption that the stock was taken for the benefit of the Wells Company. Such, however, is far from the fact. We have endeavored in the former part of this brief to show that everything connected with the transaction proved that if any stock was subscribed for it was by W. L. Wells and for his individual and personal use and benefit. If this is true, then we do not understand counsel for plaintiff in error to deny that it was an *ultra vires* contract. No lawyer would contend that a corporation could lawfully and within its legitimate powers agree that $50,000 of its assets should go in payment of the individual subscription of one of its agents to stock in another corporation.

Authorities are not needed, but we refer to the following as showing that all such contracts whereby the corporation diverts its funds into any venture for the benefit of an individual or becomes surety for another, or the like, are *ultra vires* and void:

Clark & Marshall, Corp., sec. 184.

Lucas *vs.* White Line Trans. Co., 70 Ia., 551; 59 Am. St. Rep., 454.

Best Brewing Co. *vs.* Klassen, 185 Ill., 27; 76 Am. St. Rep., 26.

In Pearce *vs.* Mad. & Ind. R. R. Co., 21 How., 441, the court said that the public (and, we may add, particularly creditors) have "an interest that neither the managers nor the stockholders transcend their authority," and it was held that the act complained of in that case was *ultra vires* and void, because this "diverted their capital from the objects contemplated by their charters and exposed it to perils for which they offered no sanction."

Now, applying the reasoning of these cases, we submit that there never was a better illustration of the wisdom of the doctrine announced than the case at bar. According to the contention of the plaintiff in error, the contract contemplated that the assets of this corporation to the amount of $50,000 should be invested in stock in a corporation which is now defunct and insolvent, while the bank in Vicksburg, to which the company now owes $27,000 (p. 37), must stand by powerless, and this, too, notwithstanding the fact that Love had written the Wells Company that he would pay for the cotton and Wells had communicated this fact to the bank (p. 119).

Assuming, then, that we have shown that the contract in reference to the application of the funds of the Wells Company in payment of the Loray stock was *ultra vires*, we submit that the whole plea of the plaintiff in error as to payment is thereby "plucked up by the roots." This will appear from the following corollaries:

(1.) *If the contract was ultra vires, then it was absolutely void and was not capable of being ratified.*

If this proposition be true, then we submit that it completely disposes of all the contention in this case that there has been in any way a ratification of the agreement to appropriate the funds of the Wells Company in payment for stock in the Loray mills. This will appear from the following authorities:

In Central Trans. Co. *vs.* Pullman Car Co., 139 U. S., 59, it is said:

"A contract of a corporation which is *ultra vires*, in the proper sense, that is to say, outside the object of its creation as defined in the law of its organization, and therefore beyond the powers conferred upon it by the legislature, is not voidable only, but wholly void and of no legal effect. The objection to the contract is not merely that the corporation ought not to have made it, but that it could not make it. *The contract cannot be ratified by either party, because it could not have been authorized by either. No performance on either side can give the unlawful contract any validity, or be the foundation of any right of action upon it.*"

This language was also cited and expressly approved in Jacksonville M. P. R. & Nav. Co. *vs.* Hooper, 160 U. S., 514, 524, 530.

As said in McCormick *vs.* Market Nat. Bank, 165 U. S., 550:

"The doctrine of *ultra vires* by which a contract made by a corporation beyond the scope of its corporate powers is unlawful and void, and will not support an action, rests as this court has often recognized and affirmed, upon three distinct grounds: The obligation of any one contracting with a corporation to take notice of the legal limits of its powers; the interest of the stockholders, not to be subject to risks which they have never undertaken; and, above all, the interest of the public, that the corporation shall not transcend the powers conferred upon it by law!"

All of the cases just cited are affirmed, commented upon, and the doctrine enlarged in the recent case of Cal. Nat. Bank *vs.* Kennedy, 167 U. S., 362, and we invite the careful attention of the court to this case in which the Supreme Court of the United States, after exhaustive opinion, overruled the Supreme Court of California.

(2.) *If the contract was ultra vires, then the Wells Company, even though it claimed benefits under the contract, was not estopped to contest it.*

We have contended throughout the case that the contract was not for the benefit of the Wells Company, but conceding for the sake of argument that W. L. Wells Company took benefits under the contract, and did so with full knowledge of all the facts, yet this would not prevent the company from contesting the validity of the *ultra vires* contract.

We are aware that upon this point there is a great divergence of authority, and we may admit that a large number of the State courts hold the contrary of the proposition stated above. But it is sufficient for us that in the courts of the United States, and particularly in the Supreme Court of the United States, the doctrine is laid down most emphatically that a corporation cannot be estopped from contesting an *ultra vires* contract upon the ground that it has received benefits under the contract.

In the case of Cal. Nat. Bank *vs.* Kennedy, 167 U. S., 362, there was an appeal from the Supreme Court of the State of California, and the case will also be found in 101 Cal., 495. The California Supreme Court had held that the bank, having received dividends upon the stock which it had purchased in another corporation, was thereby estopped to contest its liability as a stockholder; but the Supreme Court of the United States overruled the Supreme Court of the State of California and held, in the clearest and most explicit manner, that, according to the rulings of that court, the receipt of benefits by a corporation did not stop it from denying its liability on an *ultra vires* contract.

To the same effect is the First Nat. Bank *vs.* Hawkins, 174 U. S., 367, overruling 79 Fed., 51, and 82 Fed., 301.

The reason for this rule is clearly stated by the Supreme Court of Illinois in Nat. Home B. & L. Asso. *vs.* Home Sav. Bank, 181 Ill., 35, where the court says:

"If there is no power to make the contract there can be no power to ratify it; and it would seem clear that the opposite party could not take away the incapacity, and give the contract vitality by doing something under it. It would be contradictory to say that a contract is void for an absolute want of power to make it, and yet it may become legal and valid as a contract by way of estoppel through some other act of the party under such incapacity, or some act of the other party chargeable by law with notice of the want of power."

This doctrine is not confined to public corporations nor to corporations which are *quasi-public*. In Park Hotel Co. *vs.* Bank, 86 Fed., 742 (C. C. A.), the doctrine was applied to hotel companies, and in Davis *vs.* Old Colony Co., 41 Am. Rep., 221 (Mass.), it was held to apply to a manufacturing or trading corporation.

The rule is not different, because, as claimed by plaintiff in error, this is an executed contract.

It is urged that the contract is already *executed*, and that therefore, even if *ultra vires*, the court will not disturb it. An analysis of the case will show that this position is untenable.

The plaintiff in error does not claim that it paid the $50,000 to the Wells Company, but it claims that it turned the money over to the Loray mills in payment of a stock subscription, and it now relies upon a *ratification* on the part of the Wells Company to support its contention that the court should allow this credit. The plaintiff in error comes into court and says:

"I admit I have not paid the amount which the plaintiff sues for, but I claim that I paid the sum of $50,000 to the Loray mills. I admit I had no authority for this payment, but I contend that after the Wells Company had knowledge of what I had done, it did not repudiate the act, but by silence acquiesced in it, and this in law amounts to a ratification, and I asked the court to allow me credit for the $50,000 paid."

It will be seen that in order to sustain this contention it must rely upon the *ratification* of an *ultra vires* act. We have shown that by the decisions of the Supreme Court of the United States the contract, being wholly void, cannot be ratified, and hence the contention of plaintiff in error must fall to the ground.

As said by the court in McCormick *vs.* Market Nat. Bank, 165 U. S., 549, there is an "obligation on any one contracting with a corporation to take notice of the legal limits of its powers," and hence Love is held in law to have known that no acquiescence or other act on the part of the Wells Company could amount to a ratification, because, as said in Central Trans. Co. *vs.* Pullman Car Co., 139 U. S., 159, "the contract cannot be ratified by either party because it could not have been authorized by either. *No performance on either side can give an unlawful contract any validity.*"

If, then, this ratification has no validity whatever, how can it be claimed that this is an executed contract, and that the Wells Company cannot, for that reason, now avoid the alleged ratification?

But was this an *executed contract?* If it was *executed, when* and *how* was it executed? It certainly was not executed on December 3, 1900, when Love alleges that he balanced the books and turned the money over to the Loray mills, because by the undisputed evidence and by Love's own admissions he gave the Wells Company no notice whatever of this unlawful and wrongful appropriation of this money.

The only answer that can be made is that it became executed not when the money was paid over to the Loray, but when the Wells Company by *acquiescence ratified it*—that is, if it was ever executed at all, it was only by virtue of the *ratification*. Therefore if the Wells Company was absolutely incapable of ratifying the act, and particularly if it could have ratified it by mere acquiescence, it must follow that there has never been any ratification, and that the contract has therefore never become *executed*. As said by Biddle, J.,

in Tippecanoe County *vs.* La Fayette R. R. Co., 50 Ind., 86, speaking of ratification of an *ultra vires* act of a corporation, "*A void act can never become valid merely because it remains unquestioned,*" or, as said by the Supreme Court of the United States in the many authorities cited above, an attempted ratification of an *ultra vires* act of a corporation is an absolute nullity.

There are cases in which courts have said that they will not interfere with the executed *ultra vires* contracts of corporations. The reason of this is that, these contracts being unlawful, the court will not interfere, but will leave the parties *in statu quo*. The case at bar, however, differs most essentially from these cases. In our case it is the defendant that is seeking to *enforce a contract, to wit, a contract of ratification*, and, as this attempted act of ratification was unlawful and therefore a nullity, it must follow that the plaintiff in error can claim no benefit under such attempted act, because "no performance on either side can give an unlawful contract *any validity*."

Central Transp. Co. *vs.* Pullman Car Co., 139 U. S., 159.

Why Judge Boyd Directed a Verdict for the Plaintiff.

Taking the evidence in this case in its strongest light for the defendant, it must be admitted that the defendant wholly failed to show any authority in W. L. Wells to make the alleged agreement, and upon the question as to whether the Wells Company had ratified the agreement there was but a bare and unsatisfactory inference to be drawn from the delay or failure of the Wells Company to make demand. We submit that no circuit court judge could have allowed a jury to find that the Wells Company had with full knowledge ratified the act, even if these inferences had been given all the weight it was possible to attach to them, and even if there had been no testimony to the contrary. We have in

the foregoing brief discussed the various aspects of the evidence upon this point and will not here repeat it.

The final question presented to the circuit judge was whether he would permit a jury to find that the Wells Company had with full knowledge ratified the act when the only possible evidence to support this was an inference to be drawn by the jury, and when over against this the plaintiff produced the testimony of John T. Wells, clear, convincing, uncontradicted, that the company did not have knowledge of the facts and had done nothing which could constitute ratification. The only ground upon which the judge could have permittad a verdict for the defendant was that he would permit the jury to find that John T. Wells had testified falsely. He saw no reason to do this, and he therofore directed a verdict for the plaintiff.

We again call the attention of the court to the cases of Fresh *vs.* Gilson, 16 Pet., 327, and Hurley *vs.* Watson, 68 Mich., 532, in which will be found full discussion of the duty of a judge where inferences or presumptions are brought in conflict with direct, positive, and uncontradicted testimony. These decisions are to the effect that the judge must direct the verdict in accordance with the direct, positive, and uncontradicted testimony.

For the convenience of the court we cite below some of the decisions of this court in regard to the duty of the trial judge in respect to directing a verdict.

In Patton *vs.* T. & P. R. R. Co., 179 U. S., 658, Mr. Justice Brewer says:

"That there are times when it is proper for a court to direct a verdict is clear. 'It is well settled that the court may withdraw a case from them altogether, and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed, or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it' (citing cases). It is undoubtedly true that cases are not to be lightly taken from the jury;

that jurors are the recognized triers of questions of fact; and that ordinarily negligence is so far a question of fact as to be properly submitted to and determined by them. (Richmond & D. R. Co. *v.* Powers, 149 U. S., 43; 37 L. ed., 642; 13 Sup. Ct. Rep., 748.) Hence it is that seldom an appellate court reverses the action of a trial court in declining to give a peremptory instruction for a verdict one way or the other. At the same time, the judge is primarily responsible for the just outcome of the trial. He is not a mere moderator of a town meeting, submitting questions to the jury for determination, nor simply ruling on the admissibility of testimony, but one who in our jurisprudence stands charged with full responsibility. He has the same opportunity that jurors have for seeing the witnesses, for noting all those matters in a trial not capable of record, and when in his deliberate opinion there is no excuse for a verdict save in favor of one party, and he so rules by instructions to that effect, an appellate court will pay large respect to his judgment. And if such judgment is approved by the proper appellate court, this court, when called upon to review the proceedings of both courts, will rightfully be much influenced by their concurrent opinions."

In Delaware, L. & W. R. Co. *vs.* Converse, 139 U. S., 460, Mr. Justice Harlan says:

"But it is well settled that the court may withdraw a case from them altogether and direct a verdict for the plaintiff or the defendant, as the one or the other may be proper, where the evidence is undisputed or is of such conclusive character that the court, in the exercise of a sound judicial discretion, would be compelled to set aside a verdict returned in opposition to it. (Citing cases.) 'It would be an idle proceeding,' this court said in North Pennsylvania R. Co. *v.* Commercial Bank, 123 U. S., 727, 'to submit the evidence to the jury when they could justly find only in one way.'"

In Pleasants *vs.* Fant, 89 U. S., 116, Mr. Justice Miller states the law as follows:

"In the discharge of this duty it is the province of the court, either before or after the verdict, to decide whether the plaintiff has given evidence sufficient to support or justify a

verdict in his favor. Not whether on all the evidence the preponderating weight is in his favor; that is the business of the jury; but conceding to all the evidence offered the greatest probative force which according to the law of evidence it is fairly entitled to, is it sufficient to justify a verdict? If it does not, then it is the duty of the court after a verdict to set it aside and grant a new trial. Must the court go through the idle ceremony in such a case of submitting to the jury the testimony on which plaintiff relies, when it is clear to the judicial mind that if the jury should find a verdict in favor of plaintiff that verdict would be set aside and a new trial had? Such a proposition is absurd, and accordingly we hold the true principle to be, that if the court is satisfied that, conceding all the inferences which the jury could justifiably draw from the testimony, the evidence is insufficient to warrant a verdict for the plaintiff, the court should say so to the jury."

In North P. R. R. Co. *vs.* Com. Nat. Bank, 123 U. S., 727, Mr. Justice Field says:

"There is no doubt of the power of the circuit court to direct a verdict for the plaintiff upon the evidence presented in a cause, where it is clear that he is entitled to recover, and no matter affecting his claim is left in doubt to be determined by the jury. Such a direction is eminently proper, when it would be the duty of the court to set aside a different verdict, if one were rendered. It would be an idle proceeding to submit the evidence to the jury, when they could justly find only in one way."

CONCLUSION.

Finally, we submit to the court that no wrong or injustice can be done in the affirmance of this judgment. Whatever the defendant, through its agent, Love, may have done in using its funds in paying W. L. Wells' individual subscription to the stock of the Loray mills was done without any authority from the Wells Company. He does not even claim to have given notice of the $40,000 payment which he alleges

was made on the 3d of December, 1900, until more than thirty days after it was paid, so that it is plain that even if the Wells Company had had full notice of what was done its failure to repudiate the act already done by Love in transferring these funds would not have been prejudicial to the defendant.

If the defendant has any claim it is against W. L. Wells, and the defendant should be required to pursue its remedy against W. L. Wells. The evidence shows that he is abundantly solvent, and if he made this subscription and directed this payment of the defendant's funds he is personally liable, and in an action between the defendant and W. L. Wells all the letters and conversations between Wells and Love will be competent, and the issue between them can be settled and the defendant recover every dollar that is justly due it. In this respect the case is exactly like that of Hurley vs. Watson, 68 Mich., 532, already cited, in which the court called attention to the fact that the defendant would still have his right of action against the agent whose personal debt the defendant had sought to pay out of the proceeds of property of the plaintiff which the defendant had purchased.

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CHARLES W. TILLETT,
Counsel for W. L. Wells Company, Petitioner.

SUPREME COURT OF THE UNITED STATES.

October Term, 1916.

No. 237.

W. L. WELLS COMPANY, Petitioner,

vs.

GASTONIA COTTON MANUFACTURING CO.

SYLLABUS TO BRIEF FOR PETITIONER AND REPLY TO SUPPLEMENTAL BRIEF FOR RESPONDENT.

(19,313.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 237.

W. L. WELLS COMPANY

vs.

GASTONIA COTTON MFG. CO.

SYLLABUS TO BRIEF OF PETITIONER AND ITS REPLY TO SUPPLEMENTAL BRIEF OF RESPONDENT.

JURISDICTION.

Plaintiff a corporation de jure.

(1.) The corporators of plaintiff applied in April, 1898, for a charter of incorporation under the laws of the State of Mississippi, which was duly approved by the governor of said State, and on the 18th day of July, 1898, formally accepted by said corporators, who thereupon opened books of subscription, when $10,000 capital stock was subscribed. On the same day the stockholders met and elected three directors; one W. L. Wells was president; another, George Butterworth, was vice-president, and the third, John T.

Wells, was secretary and treasurer. The said charter was duly recorded in the office of the secretary of state of the State of Mississippi, and also in the office of the clerk of the chancery court of Warren county, Mississippi, where the said plaintiff was domiciled.

In the early part of the cotton season of 1898 and 1899 the plaintiff and the defendant (a corporation organized and existing under the laws of the State of North Carolina) commenced doing business and continued to carry on said business *for a period* embracing two succeeding cotton seasons and the part of a third, and all said business was transacted by plaintiff in its corporate name. All the cotton was bought by defendant from the plaintiff as a corporation and in its corporate name. All payments therefor were made by the defendant to plaintiff as a corporation and in its corporate name, and all invoices were in the name of the plaintiff as a corporation, and in all the correspondence between plaintiff and defendant the corporate name was used.

At the end of the first season's business the plaintiff's net profit in its treasury, exclusive of all sums withdrawn by the stockholders and the $10,000 subscription of said corporators to its capital stock, amounted to over $22,000, and with the said original capital stock over $32,000, and the defendant owed nothing to plaintiff, having previously accounted with and paid plaintiff for all cotton purchased during that season.

At the end of the second season there was in the treasury of the plaintiff, realized from its net profits after deducting the amounts withdrawn by its said three stockholders and their $10,000 subscription to the capital stock, $27,000, and with the capital stock $37,000, and the defendant then owed plaintiff as a balance on 1,615 bales of cotton $6,998.13.

At the termination of the third season's business, wherein 794 bales of cotton were bought by defendant from plaintiff, the defendant owed plaintiff a balance of $35,397.99, exclusive of interest for the recovery of which this suit was instituted, and for which with interest ($39,313.88), a judgment

was rendered in favor of plaintiff against defendant by the circuit court of the United States for the western district of North Carolina on June 20, 1902.

Plaintiff was therefore a corporation *de jure*, and the said circuit court had jurisdiction to render said judgment.

Plaintiff was created a corporation by the terms of its charter, and its right to sue was thereby expressly authorized.

(2.) The charter of incorporation of plaintiff by words *in præsenti* created it a body corporate under the name of "W. L. WELLS COMPANY," with power "to sue and be sued," and upon the acceptance of and organization under said charter the plaintiff's right to sue cannot be denied, notwithstanding the charter provided that "as soon as $10,000 of "said stock is subscribed and paid for, said corporation shall "have power to commence business," and that at the time of said organization the $10,000 had only been subscribed, and not paid.

(2a.) Where the "charter of incorporation provides that the persons therein named be, and they are hereby, created a body politic and corporate under the name and style of" the proposed corporation it "was in itself the creation of a corporation, requiring no other act to be performed by the corporators than their acceptance of the charter"—"and the corporation is in existence for all purposes of its creation from the beginning."

Perkins *vs.* Sanders *et al.*, 56 Miss., 733, 739, 740.

St. Joseph & Iowa Railroad *vs.* Shambaugh, 166 Mo., 567.

Hammond *vs.* Strauss, 53 Md., 1.

Plaintiff was at least a corporation de facto.

(3.) "The requisites to constitute a corporation *de facto* are three: (1) a charter or general law under which such a cor-

poration as it purports to be might lawfully be organized; (2) an attempt to organize thereunder; (3) actual user of corporate franchises."

Tulare Irrigation District *vs.* Shepard, 185 U. S., 1 and 13.

See Brief, pages 19 to 39, both inclusive.

(3a.) It cannot be successfully denied that there was a general law under which plaintiff might lawfully be organized; second, that plaintiff attempted to organize thereunder, for it accepted said charter, had the same duly recorded, opened books of subscription when $10,000 was subscribed, $5,000 by W. L. Wells, $2,500 by John T. Wells, $2,500 by George Butterworth, and elected three directors; one of them, W. L. Wells, was president; another, George Butterworth, was vice-president, and a third, John T. Wells, was secretary and treasurer; and that the said plaintiff for at least three cotton seasons conducted a cotton business, buying and selling cotton and particularly selling large quantities of cotton to defendant, all in its corporate name, and actually using through these three seasons its corporate franchises.

The corporate existence of plaintiff cannot be assailed, even if the capital stock was not paid before the commencement of business.

(4.) "There may be a corporation *de facto*, the existence of which cannot be attacked collaterally,—though the capital stock, or a certain percentage thereof, was not subscribed, or paid, as required by the statute."

Clark & Marshall on Private Corporations, vol. 1, 257–259.

who cites—

Stokes *vs.* Findlay, 4 McCrary, 205.

Bibb *vs.* Hall, 101 Ala., 79.

Canfield *vs.* Gregory, 66 Conn., 917.

Union Water Co. *vs.* Kean, 52 N. J. Eq., 111.

to which may be added—

Merchants' & Manfrs.' Bank *vs.* Stone *et al.*, 38 Mich., 779.
Att'y Gen'l *vs.* Simonton, 78 N. C., 57.
Hackensack Water Co. *et al. vs.* Minna De Kay *et al.*, 36 N. J. Eq., 548.
Eaton *et al. vs.* Aspinwall, 19 N. Y., 121.
Rice *vs.* Rock Island & Alton R. R. Co., 21 Ill., 93.
Burns *et al. vs.* Beck *et al.* (Ga.), 10 S. E., 121.
McCandless *et al. vs.* Inland Co. (Ga.), 42 S. E., 449.
First Nat'l Bank of Salem *vs.* Almy *et al.*, 117 Mass., 476.
Fargason *vs.* Oxford Mercantile Co., 78 Miss., 65.
Oregonian R. R. Co., Ltd., *vs.* Oregon Ry. & Navigation Co., 23 Fed. Rep., 232.
Armour *vs.* E. Bement's Sons, 123 Fed. Rep., 56.
Andes *vs.* Ely, 158 U. S., 312.
Hammond *vs.* Strauss, 53 Md., 1.

(4*a*.) A failure to pay for the capital stock of a corporation cannot be made the basis of defense by a debtor of said corporation, and the question can only be raised by the State.

Smith *et al. vs.* Meridian & Ala. R. R. Co., 6 S. & M. 179.

(4*b*.) The failure to issue capital stock is immaterial.

Close *vs.* Glenwood Cemetery, 107 U. S., 385.

The defendant is estopped to assail the corporate existence of plaintiff.

(5.) Defendant having contracted with the plaintiff as a corporation, and being now in the enjoyment of the fruits of such contract, is estopped to deny its corporate existence.

Casey *vs.* Galli, 94 U. S., 673, 680.
Andes *vs.* Ely, 158 U. S., 312–322.
N. O. Debenture Co. *vs.* Louisiana, 180 U. S., 320, 328.
See Brief, pages 39 to 45, both inclusive.

The corporate existence of plaintiff cannot be attacked except by the State.

(6.) "Being a *de facto* corporation, the general rule is that none but the State can call its existence into question."

Tulare Irrigation District *vs.* Shepard, 185 U. S., 14.
Fargason *et al. vs.* Oxford Mercantile Co. *et al.*, 78 Miss., 65.

(6*a*.) "The courts are bound to regard it (a corporation irregularly organized and therefore a corporation *de facto*) as a corporation so far as third persons are concerned, until it is dissolved by a judicial proceeding on behalf of the government that created it."

Frost *vs.* Frostburg Coal Co., 24 How., 278.

(6*b*.) A bank organized under the laws of a territory "cannot legally exercise its powers until its charter is approved by Congress," * * * "but this defect in its constitution cannot be taken advantage of collaterally."

Smith *vs.* Sheely, 12 Wallace, 358, 361.

(6*c*.) "It cannot be shown in defense to a suit of a corporation that its charter was obtained by fraud; neither can it be shown that the charter has been forfeited by misuser or nonuser. Advantage can only be taken of such forfeiture by process on behalf of the State, instituted directly against the corporation, for the purpose of avoiding its charter."

Kayser *vs.* Bremen, 16 Mo., 88.

Cited in—

County of Macon *vs.* Shores, 97 U. S., 277.
See Brief, pages 33 to 39, both inclusive.

It is sufficient to show a de facto corporate existence to maintain suit.

(7.) "It is sufficient—to show a *de facto* corporate existence in order to sustain an action by or against an association as a corporation, on a note, bond or other contract."

Clark & Marshall on Corporations, vol. 1, page 231.

Citing cases in Georgia, Idaho, Illinois, Indiana, Kansas, Massachusetts, Missouri, Nebraska, New York, Vermont, West Virginia, and also—

Dallas Co. *vs.* Huidekoper, 154 U. S., 654.

Even where there is a condition precedent, the right to recover is maintained.

(8.) "The distinction is between an entire absence of authority in the organic law itself, and the failure to comply with some prerequisite which the law has made a condition precedent to the exercise of corporate functions. In the one case there is a want of power to act; in the other only by abuse of power conferred."

Sherwood *vs.* Alvis, 83 Ala., 115.

Smith *vs.* Sheely, 12 Wallace, 358.

Corporate act not void unless so declared by statute.

(9.) Where the failure to comply with the restrictions imposed by the statute does not by its terms vitiate and declare void the corporate acts, it is simply an inhibition and no one but the State can object.

Whitney *vs.* Wyman, 101 U. S., 392.

The issue of certificates of stock is not essential to corporate existence.

(10.) "It is not essential to the existence of a corporation that certificates of stock be issued. Without a certificate, a stockholder has a complete power to transfer his stock, to receive dividends, and to vote; and he is individually liable as a stockholder."

Cook on Corporations, 5th ed., vol. 1, sec. 13.

What is meant by the term "bona fide."

(11.) The words "*bona fide*" when used with reference to an attempted corporate organization under a charter must

be regarded, *if at all*, as the antithesis of "bad faith," using the latter in the sense of moral turpitude or a premeditated design to deceive or defraud. A corporation may fail to comply with some of the provisions of the law relating to the formation of corporations, and yet act in good faith.

See Brief, pages 72 and 73.

The re-enactment of a statute which has received judicial interpretation is a legislative adoption of that interpretation.

(12.) The Judiciary Act of September 24, 1789, was amended in 1875 and in 1888, and these amendatory acts were passed long after the Federal courts had assumed jurisdiction of corporations *de facto*, and the subsequent substantial re-enactment of the former statute, without rejecting such interpretation by the courts, is a legislative adoption of that interpretation.

Dollar Savings Bank *vs.* U. S., 19 Wallace, 227.

(12*a*.) Under the judiciary acts now in force the circuit courts of the United States have original jurisdiction of all suits of a civil nature at common law or in equity, where the amount in dispute exceeds $2,000, exclusive of interest and costs, wherein there is a controversy between citizens of different States *concurrent with the courts of the several States;* and as the State Court of North Carolina had jurisdiction of this controversy, the Federal court was also vested with jurisdiction.

An estoppel supports jurisdiction.

(13.) "An estoppel is as conclusive to support the jurisdiction as to support the contract."

Blackburn *vs.* Selma, etc., R. R., 2 Flipp, 525.

Courts act with extreme caution in adjudicating forfeiture of corporate franchises.

(14.) "Courts act with extreme caution in proceedings which have for their object the forfeiture of corporate franchises."

Mr. Freeman in his note to State *vs.* Atchison *et al.* R. R., 8 Am. St. Rep., 181.

(14*a*.) "A substantial performance of conditions imposed upon a corporation is all that is required."

Ibid., page 182.

(14*b*.) "It is a further rule that to work a forfeiture of the franchises of a corporation, there must be a wilful abuse or improper neglect, or something more than accidental negligence, excessive power, or mistake in the mode of exercising an acknowledged power."

Ibid., page 183.

Citing—

Angell & Ames on Corporations.
Boone on Corporations.
Morawetz on Corporations.
Waterman on Corporations.
Field on Corporations.

The courts must construe the charter favorably for the corporation.

(15.) "The injunction of the legislature to the courts is to construe the charter favorably and liberally for the corporation, so as to carry out its purposes."

Harris, att'y gen'l, *vs.* Miss. Valley & Ship Island R. R. Co., 51 Miss., 602.

(15*a*.) "The acts of misuser or nonuser must be touching matters which are of the essence of the contract between the sovereign and the corporation, and these must be wilful and repeated."

Ibid.

(16.) " *The State may waive its right to forfeit a charter.*"
Cook on Corporations, vol. 2, sec. 636, 5th ed.

The judgment in quo warranto proceedings is within the discretion of the court.

(17.) "A judgment in an ordinary *quo warranto* proceeding may either be a forfeiture of all the corporate franchises, and of the charter, or may be the forfeiture only of the right to do the illegal acts, and that it is within the discretion of the court to say which judgment shall be rendered."

Cook on Corporations, 5th ed., vol. 2, sec. 633.

(18.) *The franchise of being a corporation belongs to the corporators, which may survive in the mere fact of corporate existence after the corporation has parted with all its property and all its franchises.*

Julian *vs.* Central Trust Co., 193 U. S., 93.

THE MERITS.

(19 and 20.) This court has power under the act of March 13, 1891, to require any case pending in the Circuit Court of Appeals, regardless of the status of the case in that court, to be certified to it.

Forsythe *vs.* Hammond, 166 U. S., 506, 513.
See also United States *vs.* Jahn, 155 U. S., 107.
Panama R. R. Co. *vs.* McNair Shipping Co., 166 U. S., 280.

(21.) This case was decided both upon the question of jurisdiction and upon the merits by the circuit court in favor of petitioner. The Circuit Court of Appeals denied jurisdiction, but inferentially recognized the merit of petitioner's contention by permitting an amendment, and defendant admitted a large indebtedness to petitioner, and if

this court sustains the ruling of the circuit court in retaining jurisdiction the judgment of the latter as a whole should be affirmed.

(22.) The whole case practically depends upon the pivotal question "Has the plaintiff the right to sue the defendant?" for if it possesses that right it is elementary law that its funds cannot be diverted to the *payment of the individual debt of one of its stockholders without the knowledge and consent of the other stockholders*, and for that reason also the judgment of the circuit court should be affirmed.

(22a.) *Defendant confesses in its pleadings that it owes W. L. Wells Co., a firm or corporation, a large balance, and as it also owes in addition the amount unjustly retained, as found by the circuit court*, that finding should be sustained.

(23.) The sole defense on the merits as presented by the answer was that the cotton was purchased with the understanding that "a portion of the purchase-money might be invested" in the stock of another manufacturing plant, and that this understanding or agreement was ratified in two settlements between petitioner and defendant, one on August 31, 1900, and the other on December 3, 1900. The practical effect of this plea or answer was to impose upon the defendant the duty of proving that a part of the proceeds of the cotton purchased by it was to be invested for the account and use of plaintiff in that stock, and that two settlements were made between petitioner and defendant, recognizing and ratifying the agreement that such an investment was to be made.

The evidence, all of which was objected to by the petitioner, simply shows that W. S. Wells, a stockholder, without the knowledge and consent of petitioner, agreed that part of the proceeds of the cotton belonging to petitioner could be used by the defendant in the payment of his individual sub-

scription for said stock. Under the familiar rule relating to pleadings and evidence, this evidence was properly excluded and a peremptory instruction was warranted. Even if the petitioner had consented to this misappropriation and the alleged settlement established, which was not the case, the testimony would not have been admissible under the pleadings, for the plea was that the corporate funds were to be used in the purchase of stock for the corporate account, and the evidence showed, if it showed anything, that these funds were to be used in the payment of W. L. Wells' individual subscription for said stock.

(24.) The main contentions of petitioner appear on pages 95 and 96 of the brief, and are as follows:

(1.) That the vague, indefinite, and wholly unsatisfactory testimony of John F. Love, as to an equally vague and indefinite agreement on the part of W. L. Wells to apply a portion of the purchase-money of cotton in payment of stock of the Loray mills, is directly contradicted by the letters which were written after the alleged conversations and which constitute the only written agreement between the parties, and which are, therefore, the only binding agreement in reference thereto. Upon the strength of these letters and other evidence, we contend that no such agreement was ever entered into by W. L. Wells, even if he had authority to bind the petitioner by any such contract.

(2.) But it is apparent from all the evidence that W. L. Wells had no authority to bind the petitioner by any such contract. It is not contended that he had any such actual or express authority, and it is plain that he had no implied authority from the petitioner to accept anything but money in payment of cotton. No one could presume that he had any such authority, because it was not only extraordinary and out of the usual course of business, but was *ultra vires* of the petitioner.

(3.) Even if W. L. Wells made such an agreement, yet it is apparent that it was only made for his own individual benefit, and it could not be presumed that he was authorized to have the money of his principal applied in payment of his own individual stock subscription to the Loray mills.

(4.) There has been no ratification of any agreement made by W. L. Wells, because (*a*) there are no facts from which ratification could be inferred; (*b*) the Wells Company did not have knowledge necessary to constitute ratification; (*c*) the contract could only have been ratified by the party who had authority to make it; (*d*) bringing suit on the contract was not a ratification, because none of the cotton in controversy was sold under the terms of the contract set up by respondent, and, besides, it was impossible for the Wells Company to repudiate the contract and save itself harmless; (*e*) the contract was *ultra vires* of plaintiff corporation, and therefore incapable of ratification.

The propositions of law relating to the merits are as follows:

FIRST PROPOSITION.

(25.) Conceding that W. L. Wells made the contract, set out in the answer, agreeing that a part of the purchase-money for cotton sold by plaintiff to defendant should be "invested" in stock of the Loray mills, this was beyond the scope of his authority and did not bind the Wells Company.

See Brief, pages 149 to 152, both inclusive.

(25*a*.) "A party who seeks to charge the principal for the contract made by his agent, must prove that agent's authority; and it is not for the principal to disprove it. The burden is on the plaintiff."

Schutz *vs.* Jordan, 141 U. S., 213.

(25*b*.) "Mere authority to sell gives an agent no power to exchange the chattels for other property, or to take anything else than money in payment for them."

Meacham on Agency, section 352.

(25*c*.) "When an agent is authorized to sell property, he must sell for money, unless special instructions take it out of the general rule."

Brown *vs.* Smith, 67 N. C., 245.

SECOND PROPOSITION.

(26.) The alleged agreement as to applying money due for cotton in payment of stock of the Loray mills was clearly for the individual benefit of W. L. Wells, and the respondent, having been put on notice of that fact, was bound to know that W. L. Wells did not have authority to apply the funds of the Wells Company in payment of his individual subscription to stock of the Loray mills.

See Brief, pages 153 to 158, both inclusive.

(26*a*.) "No principle of the law of agency is better settled than that no person can act as the agent of another in making a contract for himself."

Chrystie *vs.* Foster, 61 Fed., 551.

(26*b*.) "The general rule is that one who receives from an officer of a corporation notes or securities of such corporation in payment of or as security for a personal debt of such officer, does so at his peril. *Prima facie* the act is unlawful, and unless actual authority shown, the person will be deemed to have taken them with notice of the rights of the corporation."

Wilson *vs.* Railroad Company, 120 N. Y., 145.

(26*c*.) "An act done or a contract made with himself by an agent on behalf of his principal is presumed to be, and is, notice of the fact that it is without the scope of his general powers, and no one who has notice of its character may safely rely or recover upon it without proof that the agent

was expressly and specially authorized by his principal to do the act or to make the contract."

Park Hotel Co. *vs.* Bank, 86 Fed. Rep., 742, and cases therein cited.

(27.) In this case it is indisputable that John T. Wells, the secretary and treasurer of petitioner, and George Butterworth, the vice-president of petitioner, constituting, with W. L. Wells, the three stockholders of petitioner, knew nothing whatever of any alleged subscription of W. L. Wells, and never authorized or ratified said subscription.

THIRD PROPOSITION.

(28.) Ratification by the Wells Company will not be implied, because it has not been affirmatively shown that the Wells Company, after full knowledge of all the material facts, did some act which might be considered in law as ratification.

See Brief, pages 158 to 162, both inclusive.

(28*a*.) "There can be no ratification of an act without knowledge of the act having been done."

Baldwin *vs.* Burroughs, 47 N. Y., 211.

Owings *vs.* Hull, 9 Peter, 627.

FOURTH PROPOSITION.

(29.) It was necessary to show actual knowledge on the part of the Wells Company in order for any act on its part to amount to ratification, and it was not sufficient to show that the Wells Company or its officers, by the exercise of diligence, might have ascertained the facts.

See Brief, pages 163 to 167, both inclusive.

(29*a*.) "Any ratification of an unauthorized contract, in order to be made effectual and obligatory upon the alleged principal, must be shown to have been made by him with full knowledge of all the material facts connected with the

transaction, to which it relates; and especially must it appear that the existence of the contract and its nature and consideration were known to him."

Meacham on Agency, sec. 129.

(29*b*.) "Generally speaking, it does not devolve upon the principal to make inquiries as to the facts. He has a right to presume that his agent has followed instructions, and has not exceeded authority."

Oxford Lake Line *vs.* Bank, 40 Fla., 359.

FIFTH PROPOSITION.

(30.) Any notice which W. L. Wells may have had of the transactions in question cannot be imputed to the Wells Company, because W. L. Wells was acting for himself in the matter in question.

See Brief, pages 167 to 168, both inclusive.

(30*a*.) "Where an agent acts for himself in his own interest, and against the interest of a principal, without the latter's consent, in a given negotiation or transaction, neither the notice nor the knowledge of the agent can be lawfully imputed to the principal."

Central Coal Co. *vs.* Good & Co., 120 Fed., 793.

SIXTH PROPOSITION.

(31.) The alleged agreement could only have been ratified by the board of directors of the Wells Company.

See Brief, pages 169 to 170, both inclusive.

(31*a*.) "A ratification can only be made when the party ratifying possesses the power to perform the act ratified."

Marsh *vs.* Fulton County, 10 Wallace, 676.

SEVENTH PROPOSITION.

(32.) The bringing of this suit to recover the purchase price of the cotton was not a ratification of the contract.

See Brief, pages 170 to 182, both inclusive.

(32a.) "It is undoubtedly a sound doctrine, established by numerous authorities, that to make a ratification effectual it must be of some act done or engagement made as agent for or on behalf of the person whom it is alleged to bind."

Shoninger *vs.* Peabody, 14 Am. St. Rep., 88 (Conn.).

(32b.) To paraphrase the language in Stewart *vs.* Woodard, 50 Vt., page 78—

"The defendant purchased the cotton sued for and attempted a mode of payment which it was bound to know was unauthorized. It has had the cotton and converted it to its own use, never having paid the plaintiff for it. The implied promise arising from taking the benefit of the delivery of the cotton is sufficient to warrant a recovery in this action."

(32c.) "What the principal does in pursuance of a bargain which he has authorized his agent to make, without knowledge that his agent has entered into an unwarranted contract, is not a ratification of such contract. And if, when he acquires knowledge, he cannot, in justice to himself, disavow the whole of his agent's contracts, he is entitled to stand upon what he authorized, and repudiate the rest; the purchaser, who dealt with a special agent, without noting the bounds of his power, must suffer rather than the innocent principal."

Cooley *vs.* Perrine, 12 Vroom, 222.

EIGHTH PROPOSITION.

(33.) Conceding that the Wells Company obtained benefits from the alleged agreement and retained these benefits after knowledge of the contract, this retention of benefits would not amount to a ratification under the circumstances of this case.

See Brief, pages 183 to 190, both inclusive.

(33a.) "The receipt of the proceeds of the sale in ignorance of any such undertaking (a warranty by the agent) is neither an assent to the breach of duty, nor an extension of the au-

thority of the agent." * * * "In the case before us it is claimed that the receipt by the testator of the proceeds of an authorized sale is to be deemed an adoption of a contract, made without his authority, and to which he never knowingly assented. Such a ruling would be subversive of well-settled legal principles, and would open the door to illimitable frauds by brokers, factors, attorneys and others, clothed with limited powers, and occupying strictly fiduciary relations."

Smith *vs.* Tracy, 36 N. Y., 79.

(33*b*.) "To hold that the principal is bound by agreements between the special agent and the person with whom he contracts, not authorized by the agent's appointment, and of which he had no knowledge when he accepted the benefits of the contract, would be entirely subversive of the whole doctrine of special agency."

Roberts *vs.* Rumley, 58 Ia., 301.

NINTH PROPOSITION.

(34.) The undisputed evidence shows that there was no actual ratification by the Wells Company, and whatever inferences of ratification might have been drawn from the failure of the Wells Company to demand money were fully explained and rebutted by the direct, positive, and uncontradicted testimony of J. T. Wells, and in this state of the evidence it was the duty of the circuit judge to direct a verdict for plaintiff.

See Brief, pages 190 to 197, both inclusive.

(34*a*.) "Presumptions can stand only whilst they are compatible with the conduct of those to whom it may be sought to apply them, and still more must give place when in conflict with clear, distinct, and convincing proof."

Fresh *vs.* Gilson, 16 Peter, 327.

Hurley *vs.* Watson, 68 Mich., 532.

TENTH PROPOSITION.

(35.) The diversion of $50,000 of the funds of the W. L. Wells Company in payment of subscription to stock in the Loray mills was *ultra vires*, whether the stock was intended for the W. L. Wells Company or for W. L. Wells individually.

See Brief, pages 198 to 208, both inclusive.

(35*a*.) This is a Mississippi corporation, and its powers are to be considered in the light of the laws of that State, and in Woodbury *vs.* McClurg, 78 Miss., 831, the Supreme Court of Mississippi, construing the statute under which petitioner was organized, held—

"No corporation shall directly or indirectly purchase or own capital stock, or any part thereof, of any corporation."

(35*b*.) The contract was *ultra vires*, and was absolutely void and not capable of being ratified.

See Brief, pages 203 and 204, both inclusive.

(35*c*.) The contract being *ultra vires*, the petitioner, even though it claimed benefits under the contract, was not estopped to contest it.

See Brief, pages 205 to 206, both inclusive.

(35*d*.) The rule is not different because, as claimed by the plaintiff in error, this is an executed contract.

See Brief, pages 206 to 208, both inclusive.

(36.) Bringing suit on a contract made by an agent will not amount to a ratification of the unauthorized provisions of the contract, and particularly so when the principal had no knowledge of such provisions until it was impossible

for him to repudiate the entire contract without injury to himself.

See Martin vs. Hickman, 41 S. W., 852.

Peremptory instruction proper.

(37.) "Whenever the evidence is not legally sufficient to serve as the foundation of a verdict, the court should so instruct the jury." * * * "Where there is no evidence upon which a jury can properly proceed to find for the party producing it, conceding to evidence the greatest possible force to which it is fairly entitled, the court may withhold case from jury."

Rose's Digest, vol. 3, title Trial, page 2528.

REPLY TO SUPPLEMENTAL BRIEF FOR RESPONDENT.

The respondent now practically confesses error, so far as the jurisdiction of the circuit court is concerned, and seeks to avoid a final determination here of the entire case by citing—

American Sugar Refining Co. *vs.* City of New Orleans, 181 U. S., 277.

That case, as will be readily perceived, is not in point. There the *Circuit Court of Appeals* reached the conclusion that *it had no jurisdiction* to entertain the appeal, but the jurisdiction of the circuit court was admitted, and *two* defenses on the merits, one involving a grave constitutional question, were presented. Besides in that case "the petitioner prayed for a writ of certiorari, or for a writ of mandamus to command the judges of the Circuit Court of Appeals to hear, try and adjudge said case." Here the jurisdiction of the Circuit Court of Appeals was not involved, but the power of the circuit court was denied.

Inferentially we submit, the Circuit Court of Appeals in this case recognized the merit of plaintiff's contention by permitting an amendment, and thus authorizing the circuit court to deal with plaintiff as if it were a copartnership. A partner has no greater right to divert funds of a copartnership to his own use or to the payment of his individual debts than a stockholder has to use the property of the corporation for his personal benefit.

If the Circuit Court of Appeals had considered that the plaintiff had *absolutely no right* of recovery, the permission to continue the proceedings by authorizing the amendment would have been an expensive and useless formula.

Courts do not encourage delusive hopes in a litigant, and in this age of practical achievement it is the substance and not the cerement which invites judicial exposition; both the jurist and the legislator now seek to achieve results with expedition and with as little formality as possible; but whether our inference is maintainable or not, we contend that this case, which is in some respects unique and unprecedented, should be finally decided here upon the merits.

The principles involved are all elementary, and the plaintiff should no longer be delayed in the enforcement of the collection of the debt so justly, and a considerable portion thereof admitted to be, due it. The debt was contracted in 1900; there has been one trial in the circuit court, two hearings in the court of appeals, and defendant confesses it owes petitioner a large balance, but which it did not pay into court, and is therefore using for its own purposes, and there is no reason why a further hearing should be allowed in any other court if this court sustains the jurisdiction.

The testimony introduced by defendant did not even tend to establish its sole defense, and was properly excluded by the circuit court. It does not require argument to maintain—

First. That the president of a corporation, owning one-half of its capital stock, could not use the corporate fund without the knowledge or consent of the other two stockholders in payment of his individual subscription of $50,000 to the capital stock of another corporation.

Second. That a plea which charges that the cotton was purchased with the understanding that part of the funds was to be invested by the selling corporation in the stock of a third corporation cannot be the basis of recovery when the evidence shows that the corporate fund was to be applied solely and wholly, under an agreement with an agent of the selling corporation, to the discharge of the personal obligation of said agent.

Third. That a corporation or partnership possessing a capital of only $10,000 cannot be permitted, in violation of the laws of the State of its creation, to subscribe, directly or indirectly, $50,000 to the capital stock of another corporation.

Fourth. That the very statement that a corporation or partnership with $10,000 capital can have $50,000 of its assets diverted by a stockholder or copartner, without the knowledge or consent of the other stockholders or copartners, to the payment of that stockholder's or copartner's individual debt cannot be upheld in any court.

Besides, it is a maxim of law that it is to the interest of the Republic that litigation should cease which, although the basis of the doctrine of *res judicata* could be justly applied here, and no useful purpose can be accomplished by the further prolongation of this already protracted, needless, and costly litigation.

We further submit that the law does not require that the plaintiff should be punished because of the errors of procedure on the part of the defendant, and punishment, if any, should be imposed upon the offender and not upon the innocent. This case should have been brought here directly from the circuit court by the defendant had it suited its purpose. Having been brought here at the instance of the petitioner, after an adverse verdict in the Circuit Court of Appeals, under the general powers vested in this court, we submit that the right to final adjudication should be recognized.

This court has said in

United States *vs.* Jahn, 155 U. S., 109:

"The act (of 1891) was passed to facilitate the prompt disposition of cases in this court, and to relieve it from the oppressive burden of general litigation, but the right of review by appeal or writ of error and of invoking the supervisory jurisdiction of this tribunal, were sought to be amply secured, and should not be circumscribed by too narrow a construction."

A cursory examination of the record clearly shows that there is no principle of law contended for by the petitioner which can be successfully controverted by the defendant; that there are no facts which justify a reversal of the action of the circuit court on the facts; that defendant retains possession of the large sum it confesses belongs to petitioner, and we submit that the finding of that court, under all the circumstances in this case, should receive final approval here.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 237.

W. L. WELLS COMPANY, PETITIONER,

vs.

GASTONIA COTTON MANUFACTURING COMPANY,
RESPONDENT.

ON PETITION FOR WRIT OF CERTIORARI.

BRIEF FOR RESPONDENT.

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BRIEF FOR RESPONDENT.

It is submitted that the writ of certiorari should not issue in this action, as it is not such a case as is contemplated by the act of 1891, establishing the circuit court of appeals.

In the case of Forsyth *vs.* Hammond, 166 U. S., 506, Mr. Justice Brewer has carefully pointed out in what cases the writ will issue. He shows the importance of the court, and how it relieves the Supreme Court of the burden imposed upon it, in the number of cases, carried there by writ of error, or appeal.

It certainly, as we read this opinion,—so useful to the profession,—was not to be inferred, the court would grant the writ, in every case. The fact that the same is granted in so few

cases, as we see them reported, shows this court is, as Justice Brewer says, "chary of action in respect to certioraris."

In the first place, before the court will grant the writ, to the circuit court of appeals, there must be a *final judgment, or decree,* in that court, sought to be reviewed.

There is no final judgment here, as the opinion of Judge Simonton shows.

There was action to be taken in the circuit court, upon the coming down of the mandate.

On page 514 of volume 166, United States, in the Hammond case, says the Justice:

"We have declined to issue writs of certiorari, in cases where, there being only a matter of *private interest*, there had been no final judgment in the *court of appeals*."

What was the judgment? That there was no corporation, chartered under the laws of Mississippi; but if the plaintiff wished to proceed in the circuit court, it could do so by substituting the names of W. L. Wells, John T. Wells, and George Butterworth, as partners, plaintiffs in this action.

See last paragraph of opinion of Judge Simonton, printed in this brief, on page —, &c.

This is only a matter of private interest, being an action at law, to recover money on a *special contract*, as the record will show, and as this brief will, also.

So, when the case goes back to the circuit court, the question is not that judgment be entered for plaintiff or defendant; but, in the first instance, whether the plaintiff will accept the suggested amendment and go on with the merits, or go out of court.

It is plain to be seen that what the petitioner wants, is to avoid the consideration of the merits, by a jury. The record will show that Butterworth, and John T. Wells, are utterly insolvent. Also that W. L. Wells is the company, and the company, W. L. Wells (83 Fed. Rep., 570).

They allege a corporation, and when held liable, on contracts made by W. L. Wells, president, and manager, the only one solvent, petitioner contends W. L. Wells had no power to contract.

It is a rule, that "no case should go up by piecemeal."

To illustrate this rule, suppose this court should grant the writ of certiorari, and after argument, should decide to overrule and reverse the circuit court of appeals, the judgment would be, as we take it, that the mandate issue to the circuit court, there to be proceeded with, in accordance with the opinion filed by the justice. That being so, the merits of the case, in the circuit court of appeals, and in the Supreme Court, would remain unconsidered entirely, and the respondents, the defendants, deprived of their right to review the circuit court's decision, on the merits of the action. Therefore, the rule that "no case should go up by piecemeal."

We observe that the tendency of all of our courts, now, is to consider the merits of the case.

We do not deny that the Supreme Court of the United States, under the act of 1891, as said by Justice Brewer, can issue its writ of certiorari, in any case, but, in doing so, the court has marked the way,—the manner, in which it must be done.

This petitioner has not come within any rule laid down by the justice.

First. It is not a final decree of circuit court of appeals.

Second. There is no conflict between State supreme court and circuit court of appeals.

Third. There is no serious conflict between the circuit court of appeals, of one circuit, and that of another, which might bring about serious results between Federal courts of equal authority, and jurisdiction.

Fourth. "It applies to every case in which, but for it, the decision of the circuit court of appeals would be *absolutely final*" (page 513, 166 U. S.).

We have shown the decision of the circuit court of appeals in this instance is not final (*ante*).

Fifth. It does not apply to cases of private interest, unless the judgment is *absolutely final.*

Sixth. There is no matter affecting the nation, in its internal or external relations, involved in this case.

In the next place, we must observe that the petition was not drawn, in this case, in the light of the rules as laid down in Forsyth against Hammond, 166 U. S. R.

Another thing we notice; the fact that the petitioner assumes virtually the proposition he is trying to maintain.

Our argument is made upon the presumption that we are trying the question, or issues, one and two, as upon a plea in abatement, and Judge Simonton's opinion so treats it. The merits of the case are not involved in those issues, but only the question whether there was a corporation. The only evidence upon these issues the court will find on page 1 to 15, etc., in brief hereto attached; also in Judge Simonton's opinion. We suppose the record will constitute a part of the record the petitioner will file.

We call particular attention to the opinion of Judge Simonton, which we also assume will be printed as a part of the record, and is a part of this brief.

Again, in further comment upon this case of Hammond, 166 U. S., 506, it is submitted, that this court, speaking of the power, under the act creating the circuit courts of appeal to bring before it for review the action of those courts, says:

"Obviously a power so broad and comprehensive, if carelessly exercised, might defeat the very thought and purpose of the act creating the courts of appeal. So exercised it might burden the docket of this court with cases which it

was the intention of Congress to terminate in courts of appeal, and which, brought here, would simply prevent that promptness of decision which, in all judicial actions, is one of the elements of justice."

And, in the same case, on page 513, it is said that,

"While this power is coextensive with all possible necessities, and sufficient to secure to this court a final control over the litigation in all courts of appeal, it is a power which will be sparingly exercised, and only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict between two or more courts of appeal, or between courts of appeal and the courts of a State, or some matter affecting the interest of the nation, in its internal or external relations, demands such exercise."

Moreover, a case cannot be removed by writ of certiorari from the circuit court of appeals to this court, except in cases where the judgment of that court was a final one.

Chicago & N. W. Ry. Co. *vs.* John Osbourne, 146 U. S., 355.

It is therefore to be inquired whether this case is of such a nature as to bring it within the rule laid down in Forsythe *vs.* Hammond, *supra*, and, if so, whether or not the judgment of the circuit court of appeals was final.

It appears, both from the petition and from the brief of counsel for the petitioner, that no matter affecting the interest of the nation or its internal or external relations, demands the exercise of the power of the court, nor does our case involve the necessity of avoiding a conflict between the circuit courts of appeal and the courts of a State.

The court must, therefore, be appealed to to exercise this power, because either of the "importance of the question or the necessity to avoid conflict between two or more courts of appeal."

1. The importance of the question involved does not require the issuing of the writ, as will appear, we think, from the following statement: "The title of the action, as instituted in the circuit court of the United States is W. L. Wells Company *vs.* Gastonia Manufacturing Company."

In the summons it is said that the plaintiff, W. L. Wells Company, is a citizen and resident of the State of Mississippi. This averment was made in order that it might appear that the said circuit court had jurisdiction of the action.

In the complaint filed (Record, p. 3), it was alleged that the plaintiff was a corporation created and duly organized under the laws of the State of Mississippi. This allegation of the complaint was made that it might appear therefrom that the court had jurisdiction of the action, and that the plaintiff had power to make the contract set out in the pleading, and to enforce that contract in that court.

The defendant, in its answer, (Record, p. 7) denied, in terms conforming to the rules of pleading in North Carolina, that the plaintiff was a corporation duly created and organized under the laws of the State of Mississippi.

This allegation, on the part of the plaintiff, and denied, on the part of the defendant, raised an issue of fact, which the court proposed to submit to the jury for its determination.

The issue appears on page 10 of the Record: "(1) Is plaintiff a corporation, as alleged in the complaint?" (2) "Is plaintiff a resident and citizen of the State of Mississippi?"

The burden of proving the affirmative of these issues was assumed on the trial by the plaintiff, it having made no objection whatever to the same.

In the attempt of the counsel representing the plaintiff to prove their client was a corporation, duly created and organized under the laws of the State of Mississippi, and a resident and citizen of that State, it was shown that three citizens of the State of Mississippi, to wit: W. L. Wells, a man of considerable means, and John Wells and one But-

terworth, had applied to the State of Mississippi for a charter of a corporation to be called the W. L. Wells Company; that the State of Mississippi, through its governor, after the submission of certain questions to the attorney general of that State, as the statute required, granted to those individuals the right to form a corporation and commence business under that name, whenever $10,000 of stock had been *subscribed for and paid.*

It was further discovered, in the examination of the plaintiff's witness, that, while $10,000 had been subscribed to the capital stock, *no part of that sum had been paid* into the treasury of the company, unless the payment of that sum was to be inferred from the fact that these individuals, assuming to do business under the name of the Wells Company, had earned in the business thus conducted profits exceeding $10,000.

It is sufficient here to say that his honor, Judge Boyd, who tried the case in the circuit court, ruled that the evidence was sufficient to prove the payment of the $10,000, and that, therefore, the condition imposed upon these individuals had been fulfilled, and therefore, of course, the creation of the legal entity by the State of Mississippi was complete, and the Wells Company was a corporation *de jure* of that State.

From this ruling of Judge Boyd it followed that the plaintiff was entitled to enforce the contracts made with it in that court, it being, because of its creation and organization under the law of the State of Mississippi, a citizen and resident of that State.

When the case was taken from the circuit court to the circuit court of appeals, by writ of error, one of the numerous questions to be decided was this: Whether or not, the evidence proved the payment of the $10,000, which the so-called charter stated should be paid before the proposed corporation commenced business.

Judge Boyd held that the payment was proved. The circuit court of appeals held that the payment was not proved. The evidence upon this point was not contradictory.

Another question that was to be decided was this one: Whether, if the $10,000 spoken of in the charter had never in fact been paid, the Wells Company was a corporation, duly created and organized under the laws of the State of Mississippi, and therefore a citizen and resident of that State, and the circuit court of appeals held that, being of the opinion that the $10,000 spoken of, had never been paid, and that the payment of that sum into the treasury was a *condition precedent to the commencement by these individuals of business as a corporation*, it followed that the Wells Company was not a corporation, duly created and organized under the laws of the State of Mississippi and a citizen and resident of that State, and therefore it followed that the circuit court had no jurisdiction of the action, and the plaintiff, whatever might be its rights in some other tribunal, because of the fact that it was doing business in the State of Mississippi and assuming to act as a corporation, could not, in the circuit court of the United States, enforce such rights, because it had failed to show such residence and such citizenship diverse from that of the defendant, as entitled it to invoke the jurisdiction of the circuit court of the United States for the western district of North Carolina in the enforcement of its contract with a citizen of the State of North Carolina.

Now, we respectfully submit that there is no such importance to be attached to the decision of the circuit court of appeals, as to require of this court the exercise of that power which it has said should be sparingly exercised, because it might burden the docket of this court with cases which it was the intention of Congress to terminate in the courts of appeal.

Cases involving private contracts are not "important" within the purview of that decision of this court. To be worthy of a standing in that category, the case must involve more than mere dollars and cents. It must involve the decision of some important principle of law, the wrong es-

tablishment of which, would work harm in the general jurisprudence of the country.

But, it is insisted by the petitioner that the decision of the circuit court of appeals is in conflict with that of other circuit courts of appeal upon the same point, and in conflict, also, with the decision of this court upon the point in controversy, and that because it produces a "conflict between two or more courts of appeal," the writ should issue.

It is, therefore, now to be inquired whether the decision of the circuit court of appeals as announced in the opinion filed by Judge Simonton, and made a part of this brief, is in conflict with the decisions of other circuit courts of appeal, and with the decisions of this court upon the point involved.

Here let it be noted, that the statement contained in the petitioner's brief, that "it is conceded in the opinion of the circuit court of appeals that the plaintiff is at least a *de facto* corporation," is not correct; nor is it true, as in that brief stated, that it is admitted on all sides, that the plaintiff is at least a *de facto* corporation. What the plaintiffs in error in the circuit court of appeals insisted upon, and what that court decided, is so fully and carefully set out in the opinion of Judge Simonton, that we hesitate to trouble this court with any attempted explanation of that opinion.

It will be found, upon examination, that the circuit court of appeals declared, it was manifest, from the record evidence in the case, that the State of Mississippi intended to impose, and did impose, upon the individuals seeking at its hands the right to do business as a corporation under the name of the Wells Company, a condition precedent, to wit: that they should not only subscribe for, but *actually pay* into the treasury of the company, the sum of $10,000, before commencing business.

The circuit court of appeals held further that the evidence disclosed the fact that that payment had never been made, but that these individuals, knowing, of course, the condition that the State of Mississippi had prescribed; knowing that

they had not complied therewith, without stock or stockholders, without a seal; without doing any one of those things, which indicate corporate life and activity, did business under the name of the Wells Company in fraud of the law.

The circuit court of appeals decided that, these facts being admitted, the Wells Company was not a *de jure* corporation; that it was not what it alleged in the summons it was, to wit, a citizen and resident of the State of Mississippi, and that it was not, as it alleged in the first section of its complaint, a corporation duly created and organized under the law of that State.

The authorities upon which the circuit court of appeals, through Judge Simonton, put this decision, are set out in the opinion, to which we respectfully refer this court, and to the brief of the plaintiff in error in that court, printed as a part of this one.

We may assume, we think, that no cases can be found which show that this decision of the circuit court of appeals is in conflict with the decision of other circuit courts of appeal, or with the decisions of this court, except those cases which have been found by the diligent counsel and have been set out in the brief. We will therefore consider those cases seriatim.

The first case cited is that of Tulare Irrigation Co. *vs.* Shepard, 185 U. S., 1.

In that case the defendant corporation sought to escape its liability on bonds issued by it upon the ground that its organization had not been regularly and completely consummated.

The court decided that it did not lie in the mouth of the defendant, who had received benefit from the sale of the bonds and which had *bona fide* endeavored to be organized according to law, to deny its own liability as a corporation, in order to escape from the obligation which it had assumed and for which it had received benefit.

That is not our case. Here the court has found that the attempted organization was not *bona fide*, and, moreover, that the effort of the Wells Company was to escape its just liability by taking advantage of its own wrong in organizing, *mala fide* and contrary to the amendatory provision of law.

The next case cited is that of Baltimore and B. T. Co. *vs.* The Fifth Baptist Church, 137 U. S., 658.

In that case the defendant sought to escape its liability to the plaintiff by pleading that the plaintiff was not duly and properly organized as a corporation. There, too, it was declared that the individuals who represented this organizing entity, having acted in good faith in their attempt to organize, and having been treated as a valid corporation, it did not lie in the mouth of the defendant to say they were not. There was no finding in that case, as in ours, that the omission was in the not performing an amendatory condition of the incorporating law, and that the omission, if any, was not in fraud of the law.

In the case of Stout *vs.* Zulic, 48 N. J. Law, 4899, the omission consisted of the failure to file certain certificates, and was not, as in our case, the failure to do some essential act, without the doing of which business was not to be commenced.

In the charter there under discussion there was no such provision as is contained in that which is under discussion in our case. A reference to this decision will show that, in the opinion filed, the court distinguished that case from the case of Hill *vs.* Beech, 12 N. J. Eq., 31, saying that, in this latter case, it was properly held that the defendants were liable as partners, upon the ground that they were not a corporation, and "the chancellor saying that they were not a domestic corporation and could not be sued as such, and that they were not a foreign corporation, for it was perfectly manifest, upon the face of their proceedings, that their at-

tempted organization, under the general law of New York, was a fraud upon that law."

Therefore, in the case last cited, those individuals who claimed to be a corporation under the general law of New York were held liable because they had attempted a "fraud upon the law," and, in our case, Judge Simonton says that the Wells Company is not a corporation, and that the members of it cannot masquerade as such, because they have attempted, evidently, a fraud upon the law of the State of Mississippi.

And in the next case cited, Trustees *vs.* Froisly, 37 Minn., 437, the omission was that of an informality or irregularity, and not, as in our case, the omission of a mandatory and essential act.

The opinion of the circuit court of appeals follows:

UNITED STATES CIRCUIT COURT OF APPEALS, FOURTH CIRCUIT.

GASTONIA COTTON MANUFACTURING COMPANY, *Plaintiff in Error,*
versus
W. L. WELLS COMPANY, *Defendant in Error.*
} No. 469.

In error to the circuit court of the United States for the western district of North Carolina, at Charlotte, N. C.

(Argued Nov. 23, 1903; decided Feb. 2, 1904.)

Before Goff and Simonton, circuit judges, and McDowell, district judge.

Charles Price and Armistead Burwell for plaintiff in error, and Murray F. Smith and Charles W. Tillett for defendant in error.

SIMONTON, *Circuit Judge:*

This case comes up by writ of error to the circuit court of the United States for the western district of North Carolina. The action was brought in the court below in the name of the W. L. Wells Company against the Gastonia Cotton Manufacturing Company on a money demand for $35,967.60. The complaint, in its first paragraph, setting out the jurisdiction of the court, alleges that the plaintiff is a corporation created and duly organized under the laws of the State of Mississippi, and is a citizen and resident of the State of Mississippi; and the defendant is a corporation under the laws of North Carolina. The defendant, in the first paragraph of its answer, admits its own corporate character under the laws of North Carolina, but adds: "It has no knowledge or information sufficient to found a belief as to the truth of the allegation contained in the first section of the complaint, to wit: that the plaintiff is a corporation organized under the laws of the State of Mississippi, and a citizen and resident of that State, and, therefore, it denies the said allegation." This is strictly in accordance with Code pleading and practice

which prevails in North Carolina. Under this system of pleading there are two modes of defence to a complaint, demurrer and answer. So this defence set up here, which ordinarily would be made by plea in abatement, is properly made in the answer (Code of Procedure of North Carolina, section 240). So when the case was heard before the jury, the court below in formulating the issues put as the first two, these:

"1st. Is plaintiff a corporation as alleged in the complaint.

"2nd. Is plaintiff a citizen of the State of Mississippi."

These issues are practically one and the same. Having formulated the issues, the court directed the jury to find them in the affirmative. The issues presented, as will be seen hereafter, were both issues of law.

The jury having found for the plaintiff on all the issues under instructions, a writ of error was allowed, and the case is here on assignments of error. The first five go to the instructions of the court on the first and second issues.

The burden of proof on these issues being on the plaintiff below, these facts appeared:

W. L. Wells was dealing in cotton in the State of Mississippi, and conducted a large business, among others with the defendants below. In 1898 a charter was applied for by him, John T. Wells and George Butterworth, for an incorporation under the name of the W. L. Wells Company. Charters in Mississippi are granted under general laws. An application is made to the governor for a charter. He refers the proposed charter to the attorney general, and upon his certificate that it is not violative of the constitution and laws of Mississippi, the governor approves it and causes the great seal to be affixed to it. In the present case the following form of charter was submitted to the governor of Mississippi, and by him referred to the attorney general 26th April, 1898.

"SECTION 1. Be it known and remembered that W. L. Wells, John T. Wells and George Butterworth, their associates and assigns, are hereby created a body politic and corporate, under the name and style of W. L. Wells Company, and by that name shall have succession for fifty years, shall have power to sue and be sued, contract, and be contracted with, may have a corporate seal, and break and alter the same at pleasure.

"SECTION 2. The capital stock of said corporation shall be

fifty thousand dollars, divided into shares of five hundred dollars each, and as soon as ten thousand dollars of said stock is subscribed and paid for, said corporation shall have power to commence business.

"SECTION 3. Said corporation is formed for the purpose of conducting a general cotton business, and may buy and sell cotton, and may transact a cotton factorage business, may advance money or supplies for the purpose of controlling shipments of cotton, may take and receive mortgages or deeds of trust upon property to secure said advances, and, generally, may have all powers conferred by chapter 25 of the Annotated Code of 1892, necessary and requisite to carry out the purpose of said corporation.

"SECTION 4. The board of directors of said corporation shall consist of three persons, whose numbers may be increased at any time by a majority vote of the stockholders, and said directors shall have power to elect all necessary officers, and prescribe the duties, salaries and tenure of such officers.

"The foregoing proposed charter of incorporation is respectfully referred to the honorable attorney general for his advice as to the constitutionality and legality of the provisions thereof.

"A. J. McLAURIN, *Governor.*

"JACKSON, MISS., *April 26th*, 1898."

"The provisions of the foregoing proposed charter of incorporation are not violative of the constitution or laws of the State.

"WILEY N. NASH,
"*Attorney General.*

"JACKSON, MISS., *April* —, 1898."

'Executive office (State coat of arms), Jackson, Mississippi.

"The within and foregoing charter of incorporation of the W. L. Wells Company is hereby approved.

Great Seal of the State of Mississippi.

"In testimony whereof, I have hereunto set my hand and caused the great seal of the State of Mississippi to be affixed this 1st day of June, 1898.

"By the governor: A. J. McLAURIN.

"J. L. POWER,
Secretary of State."

"Office of Secretary of State, Jackson, Mississippi.

"I, J. L. Power, secretary of state, do certify that the charter hereto attached, incorporating the W. L. Wells Company, was, pursuant to the provisions of chapter 25 of the Annotated Code, 1892, recorded in the Book of Incorporations in this office.

Great Seal of the State of Mississippi.

"Given under my hand and the great seal of Mississippi hereunto affixed this 1st day of June, 1898.

"J. L. POWER,
"*Secretary of State.*"

The attorney general gave his certificate in favor of the constitutionality of the proposed charter on — day of April, 1898. And on 1st day of June, 1898, the governor caused the great seal of the State to be put to the charter. The act under which the governor approved this charter declares: "The powers therein specified shall by the approval of the charter be vested in such corporation and it shall go into operation at the time and on the terms and conditions specified."

It will be noted that the second section of this charter fixed the terms and mode in which it would get life, could act as a corporation. "The capital stock of said corporation shall be $50,000, divided into shares of $500, each, and as soon as $10,000 of said stock is subscribed and paid for, said corporation shall have power to do business."

The governor having sealed the charter, the incorporators met on 18 July, 1898, read over and adopted it. Books of subscription were then opened and W. L. Wells subscribed for ten shares, John T. Wells for five shares and George Butterworth for five shares. On the same day and at the same place a stockholders' meeting was held, and W. L. Wells, John T. Wells and George Butterworth were elected directors. The meeting thereupon adjourned and the record does not disclose whether they ever met again or not. John T. Wells, who was secretary and treasurer of the company, says that when the stock was subscribed for nothing was paid; that he paid for the stock out of the profits of the first year, so did Butterworth and so did W. L. Wells. Yet he says that these profits were never divided, no dividend was ever declared, no money carried to credit of any stockholder,

no stock certificates ever issued. He goes on to say that he never paid any cash into the Wells Company, nor did Butterworth, nor did W. L. Wells, and that there was absolutely no capital to start with. That, notwithstanding, he drew out $10,217.55, and Butterworth took $9,022.65. Both he and Butterworth being men of small means, having no property liable for their debts. It is very clear from this that having a charter like this conditioned upon the payment of $10,000 in subscriptions, then these men undertook to exercise powers in the charter, without fulfilling or attempting to fulfill the conditions precedent in the charter. That even when they had made money in the business they ignored the corporation altogether, and drew the money out of the business as if it belonged to them and not to the corporation. The charter never went into operation, and the corporation never became a legal entity. More than this, these assumed corporators went on in business, contracted obligations in the name of the so-called corporation which did not possess a dollar of property, or have any mode of meeting a debt, thus seeking to cloak their transactions under an assumed corporate name, and avoid in this way all personal responsibility. At the same time two of them were, in a business sense, irresponsible. It would seem that this transaction was an abuse of, and in fraud of, the law. And that Wells Company had never and could not have any legal existence. When a corporation is formed under an enabling act, all the mandatory provisions of the statute must be complied with. In Beach on Private Corporations, section 12 (p. 18), we find: "There is a broad and obvious distinction between such acts as are declared to be necessary steps in the process of incorporation, and such as are required of the individuals seeking to become incorporated, but which are not made requisite to the assumption of corporate powers. In respect to the former, any material omissions will be fatal to the existence of the corporation, and may be taken advantage of collaterally in any forum in which the fact of incorporation can properly be called in question." The same learned author, at p. 27, says: "It is immaterial that the persons attempting incorporation have acted in good faith, and have actually carried on business under their supposed authority to act as a body corporate." This seems to be in accordance with the law in Mississippi. In *Perkins vs. Sanders*, 56 Miss., 733, the su-

preme court of that State says: "In charters which are mere propositions for the organization of a corporation, and which require certain acts to be performed precedent to the existence of the corporation, no corporation can exist, and, of course, no corporate act can be performed till these conditions have been complied with. In all such cases when a certain amount is named in the charter as necessary to be subscribed as the capital stock" (in the case at bar it must be subscribed and paid in) "such subscription" (and of course such payment) "is regarded as condition precedent to the existence of the corporation, unless otherwise provided in the charter." Discussing the broad distinction between a charter which creates a corporation, and invests it at once with corporate powers, and that class of corporations created under general laws requiring an application for a charter, the same court says: "The distinction between the two classes of charters is thus seen to be that in the first class the charter is a mere provision on the part of the legislature for the formation of a corporation upon the doing of certain acts prescribed in the charter as precedent conditions, and as a necessary result no corporate act can be done until these conditions have been performed, except such as may be expressly permitted by the charter, and to those acts it would be considered that the corporation had existence before its full investure with its corporate franchise."

It is contended, however, that the plaintiff, if it be not a corporation *de jure* is a corporation *de facto*, and will be so recognized. That, at least, the defendants having dealt with it as a corporation, are now estopped from denying its existence as a corporation. It must be borne in mind that the question we are now considering is not the relative rights of the plaintiff in error and of the defendant in error. The former may be estopped by its acts. We are dealing with a question of the jurisdiction of this court, a question which the court must always take up, *suo motu*, if necessary, the question being at the threshold of every case before it. (*Metcalf vs. Watertown*, 128 U. S., 586.)

The presumption is always against the jurisdiction of the circuit court unless the contrary affirmatively appears. (*Grace vs. Am. Cent. Ins. Co.*, 109 U. S., 278.) Its jurisdiction does not depend upon the consent of parties actually made or constructively implied by estoppel. The jurisdiction is

statutory and must follow the statute. When a corporation sues in that court, claiming jurisdiction through diversity of citizenship, it can maintain jurisdiction only by showing that it is the creation of the State of which it claims to be a corporation, and that it is really a corporation. Otherwise it is not a legal entity, a person in the eye of the law. "A corporation cannot for the purpose of jurisdiction in Federal courts be considered a citizen, or a resident, of a State in which it has not been incorporated." (*Southern Pacific Co. vs. Denton*, 146 U. S., 203.) When a complainant comes into the circuit court of the United States as a complainant and seeks to sustain the jurisdiction by virtue of its citizenship, it must establish that right in itself, and show the credentials of its birth and existence. The fact that as to certain persons and in certain transactions it may be a corporation *de facto* is not enough.

The defendant in error relies with full confidence upon the case of *Tulare Irrigation District vs. Shepard*, 185 U. S., 1. That was an action brought in the circuit court of the United States for the district of California by plaintiff against the Tulare Irrigation District, a public municipal corporation of the State of California. This district had issued coupon bonds for the purposes of their work, had floated them in the market, and plaintiff had become a *bona fide* purchaser for value. The coupons being matured, payment was refused and this suit was brought. The defence set up was on certain irregularities in forming the corporation. The act under which the corporation was created required that a petition for the organization of an irrigation district be presented to the supervisors of the county signed by the required number of freeholders. Before the petition was presented the act required that it be published in some newspaper at least two weeks before its presentation, "together with a notice stating the time of the meeting at which the same will be presented." In that case the petition was properly prepared and signed. The petition with the signatures was published in the proper newspaper together with the notice, but the signatures attached to the petition were not reproduced after the notice. All of the public signatures and notice were published in the same column and as one entire proceeding, separated from the rest of the contents of the newspaper by a black line across the column above and another across the column below this publication. This was charged as a

fatal defect, and the bonds were claimed to be invalid. The opinion of the Supreme Court strikes the keynote of the decision in the opening sentences: "It is agreed in the statement of facts of this case that the moneys received from the sale of the bonds in suit were applied to building and constructing the irrigation works now in use by the defendant corporation. It has, therefore, received full consideration for which the bonds were issued, has built its works with the proceeds, and uses such works for the purposes intended. Notwithstanding these facts, it now refuses to pay the bonds or the interest thereon, and while acting as a corporation at all times, still sets up that it never was legally organized, and hence had no legal right to issue any bonds." In the case of *Douglas County Commissioners vs. Bolles*, 94 U. S., 104, the court said: 'Common honesty demands that a debt thus incurred should be paid.' That sentiment has lost no force by lapse of time, and we think applies in its full strength to this case. Unless there be some settled rule of law which prevents a recovery in this action, the judgment under review should be affirmed." This idea dominated the decision. It is evident from the opinion that the court thought the defendant a corporation *de jure*. But in the argument, assuming that there were irregularities, the court held that inasmuch as it attempted to organize under a general law, and that it actually used the franchise, and continued to act in every respect as a corporation, it could not deny its corporate existence so as to defeat its obligations. Indeed, had any other conclusion been reached, a fraud would have been sustained. The distinction between that case and the one at bar is broad and distinct. In the latter case the plaintiff below went into the circuit court claiming the jurisdiction because, and only because, it was a corporation, resident in a State other than the defendant. It was bound to prove its claim. In doing so it did not prove a *bona fide* attempt to fulfill the conditions of its incorporation. On the contrary, there is no evidence whatever of its use of the corporate franchise. It had no certificates of stock, no corporate capital, no declaration of dividends, and, as far as the record discloses, no corporate meeting after the first. Nor, as will be seen hereafter, will the ends of justice be defeated if it be not treated as a corporation.

In *Baltimore & Potomac R. R. Co. vs. Fifth Baptist Church*, 137 U. S., 568, the point now under discussion could not arise as the jurisdiction was not involved. *Shapleigh vs. San Angelo*, 167 U. S., 646, simply decides that a State, being creator of a municipal corporation, is the proper party to impeach the validity of its creation, and if the State acquiesces in the validity of a municipal corporation, the corporate existence thereof cannot be collaterally attacked.

It will be noticed that in all the cases in which suits by or against *de facto* corporations were sustained, the ruling is that the corporate existence cannot be collaterally attacked. In the case before us there is no collateral attack. The plaintiff below itself put that question directly in issue.

In our opinion, the plaintiff below, defendant in error here, failed to establish its first allegation as to its corporate capacity, and that the court below erred in instructing the jury to find the issues in this regard in its favor.

This conclusion renders unnecessary any discussion of the other assignments of error.

The conclusion reached will not defeat the ends of justice, if the claim of the defendant in error be good. It is competent for the persons claiming to be incorporators to carry on the suit in their own names, and as they have requisite citizenship the suit can be maintained in the Federal court. *Jones vs. Aspen Hardware Co.*, 29 L. R. A., 143.

It is ordered that the judgment of the circuit court be reversed. That this cause be remanded to that court, and if the plaintiffs below, defendants in error here, be so advised as to continue the suit in that court, that they be allowed to amend their complaint by inserting their individual names as plaintiffs, and that, thereupon, a new trial be granted. If, however, they decline to do this, that the suit be dismissed without prejudice.

Reversed.

Here follows in full our brief in the United States circuit court of appeals:

CIRCUIT COURT OF APPEALS, NOVEMBER TERM, 1902.

GASTONIA COTTON MANUFACTURING COMPANY, *Plaintiff in Error,*
vs.
W. L. WELLS COMPANY, *Defendant in Error.*
No. 469.

STATEMENT OF THE CASE.

In support of the contentions of the plaintiff in error, we submit the following:

The W. L. Wells Company, alleging that it was a corporation, duly created and organized under the laws of the State of Mississippi, brought two actions in the circuit court of the United States, at Charlotte, North Carolina; one against the Gastonia Cotton Manufacturing Company, and the other against the Avon Mills.

It was agreed that these cases should be consolidated for trial, because it was known by counsel, the matter involved in the two actions constituted, really, one transaction.

These actions are founded on *special contracts, alleged in the complaints*, to have been entered into between the plaintiff corporation, and the two defendants, corporations, by the terms of which each of the defendants bought from the plaintiff a certain number of pounds of baled cotton, of a certain grade, and at prices fixed by the contracts.

In the action against the Gastonia Cotton Manufacturing Company, the complaint averred the sale and delivery of cotton, under the contract, to the amount of $111,365.59, of which only $75,967.60 had been paid, leaving a balance due of $35,397.99.

In the action against the Avon Mills, the complaint alleged the sale and delivery of cotton, *under the contract*, to the amount of $136,777.11, of which only $110,026.75 had been paid, leaving a balance due of $26,750.36.

These two balances, thus claimed, by plaintiff, amount to $62,148.35, principal money.

The defendants, admitting they received all the cotton, mentioned in the complaint, and that they had agreed to pay therefor in a certain manner the price set out in the said complaint, insisted, they were entitled to have, on a final settlement, a further credit, on the consolidated account, of $50,000.00, to wit: $10,000.00 on or about the 1st of August, 1900, and $40,000.00 in January, 1901.

His honor ruled, that, inasmuch as the *contract for the purchase* of the cotton, was admitted, as set out in the second paragraph of the answer, and also, that the cotton had been received, the burden of proving the right to have a further credit of $50,000.00, as above stated, rested on the defendants.

He also ruled, that, the fact, alleged in the first paragraph of the complaint, to wit: that, the plaintiff was a corporation, duly created and organized under the laws of the State of Mississippi, being denied, in the answer, the burden of proving the truth of that allegation rested upon the plaintiff.

The issues which appear in the record were submitted by the plaintiff, and, without exception, adopted by the court; and, the trial proceeded, upon the issues under the rulings of his honor, stated above.

The plaintiff, assuming the burden of proving the fact, that it was a corporation, duly created, and organized, under the laws of the State of Mississippi, introduced in evidence, the certificates, etc., which appear on pages 40, 41, 42, 43, 44 and 45 of the record.

It appears that the power granted, by the State of Mississippi, to W. L. Wells, John T. Wells and Geo. Butterworth, to become a corporation, under the name and style of the W. L. Wells Company, was, as we submit, coupled with a condition.

Section 2 of the charter (R., 42) is as follows:

"The capital stock of said corporation shall be fifty thousand dollars, divided into shares of five hundred dollars each; and, as soon as ten thousand dollars of said stock is subscribed and paid for, said corporation shall have power to commence business" (page 42 of Printed Record).

The plaintiff, in its effort to establish the affirmative of the first issue, then introduced the record of the meeting of the incorporators, and the record of the meeting of the stockholders.

This appears on pages 45, 46 and 47 of the Record, and that exhibit (No. 3) is the only record ever made, of any meeting of the incorporators, or the stockholders, or the directors.

The plaintiff introduced as a witness J. T. WELLS, who said that he was secretary and treasurer of the plaintiff company, and was asked these questions (R., 20):

Q. "When was the capital stock subscribed by W. L. Wells, yourself and Mr. Butterworth paid in?"
A. "Out of the profits of the first year's business."
Q. "When?"
A. "Early part of 1899."

Nothing else was said by him on his direct examination about the payment of the capital stock required by the charter. But, on his cross-examination, he testified as follows:

Q. "How many meetings did you have?"
A. "Several."
Q. "Where?"
A. "Vicksburg."
Q. "Who was present?"
A. "W. L. Wells and I, and other times, W. L. Wells and myself, and Mr. Butterworth."
Q. "Where are the proceedings of these meetings?"
A. "We didn't keep them. No record of them."
Q. "How many shares did you subscribe for?"

A. "Five shares, amounting to $2,500.00."
Q. "Did you pay for them?"
A. "Yes, out of my profits of the first year."
Q. "Where is it charged on the books?"
A. "It is not charged on the books."
Q. "Any check?"
A. "No, sir."
Q. "How was it paid?"
A. "My part of the profits of the concern."
Q. "If it is not charged, it has never been paid?"
A. "Yes, sir; it has."
Q. "It was paid from the profits of the first year. Is that the best answer you can make? How much did you pay?"
A. "I appropriated that much, $2,500.00."
Q. "Show the entry on the books."
A. "There is no entry. It is the profits of the concern."
Q. "Where is the evidence that you paid it?"
A. "I have offered as full explanation as I can."
Q. "Where is the evidence of the profits?"
A. "On the books."
Q. "Show them on the books?"
A. "It would take some time to get a trial balance of the books. If you want it, I can produce it in court in the morning."
Q. "When did you pay in the stock?"
A. "Out of the profits of the first year."
Q. "If you didn't do that, you have never paid for it?"
A. "No, sir."
Q. "When did Mr. Butterworth pay for it?"
A. "In the same way I did."
Q. "How did W. L. Wells?"
A. "In the same manner."
Q. "Where is it charged to him?"
A. "It is not charged to him."
Q. "No stock ledger or certificate?"
A. "No, sir."
Q. "No records of any meeting except what has been produced in evidence?"
A. "That is all."
Q. "Who were present at these meetings?"
A. "W. L. Wells and myself."

Q. "Any dividends declared?"
A. "No, sir."

And, further, on page 28, he testified:

Q. "I understood you to say, yesterday, that you had put nothing in the W. L. Wells Co.?"
A. "I haven't paid cash in there."
Q. "How much have you taken out of W. L. Wells Co. according to your books?"
A. "$10,217.55."

And he further testified (R., 29):

Q. "Who did furnish all the capital of the W. L. Wells Company?"
A. "There was absolutely no capital to start with."

He further testified (R., 29) as follows:

Q. "What was your salary as secretary and treasurer?"
A. "We drew no salaries."
Q. "What was your compensation to be?"
A. "One-fourth of the net profits."
Q. "What was the salary of the vice-president?"
A. "Nothing."
Q. "What was his compensation to be?"
A. "One-fourth of the profits."
Q. "What was the salary of the president?"
A. "Nothing."
Q. "What was he to receive?"
A. "He was to receive his proportion of the profits."
Q. "Was he allowed interest on the capital which he furnished the company?"
A. "No, sir; he didn't furnish any capital. He loaned them some money."

The above extracts from the testimony of the witness, John T. Wells, and from the charter offered to W. L. Wells, John T. Wells and George Butterworth, by the State of Mississippi, are all the evidence, bearing upon the contention of the defendants, to wit: that the plaintiff is not a cor-

poration, duly created and organized under the laws of the State of Mississippi, and, therefore, not entitled to bring its actions in the Federal court, and their further contention, that this evidence discloses the fact, that the W. L. Wells Company, considered as a corporation, had no power to make the contracts, set out in the complaint, and that those contracts, if made, as alleged, cannot be enforced, in any court in the name of the corporation, which W. L. Wells, John T. Wells and George Butterworth proposed to form, and which the State of Mississippi gave them permission to organize, and, under that organization, to contract, only when they had paid into the treasury the sum of ten thousand dollars, in cash.

The testimony of John T. Wells, quoted above, not being contradicted, the court ruled that the $10,000.00 required to be paid in before business was begun, *had actually been paid*, and instructed the jury to answer the first issue in the affirmative; that is to say, he declared, by that ruling, *the plaintiff was a corporation*, duly created and organized under the laws of the State of Mississippi; and, as such, had power to make, and therefore, the right to enforce the contract set out in the pleadings.

We submit the testimony of John T. Wells, taken to be true in every particular, shows the following facts, and nothing more:

(1.) That, at the meeting of the incorporators $10,000.00 of the stock was subscribed for, but was not paid in.

(2.) That the company, professing to act as a corporation, began business when not one dollar of capital stock had been paid in.

(3.) That the net profits of the business exceeded $10,000, and, if there had been a corporation, that corporation had earned a sum sufficient, if dividends had been declared, to pay to each stockholder more than his subscription for stock.

(4.) That no dividend was ever made, nor was any distribution of these profits ever agreed upon, and that what the witness meant by saying the stock had been paid for was only this, that he had money enough in the concern to pay for his stock.

(5.) That no stock was ever issued.

(6.) That no stock book was ever kept.

(7.) That the three individuals began and continued the business upon an agreement that W. L. Wells should have half of the profits, John T. Wells one-fourth of the profits, and George Butterworth one-fourth of the profits, and that neither one of them should draw any salary.

We submit that the conclusion to be drawn from these facts is not the conclusion which the court drew, "that the defendant was a corporation, duly created and organized under the laws of the State of Mississippi;" but these facts, to wit: that these three individuals failed to conform to the law which authorized them to assume the functions of a corporation, and that, with full knowledge that they had so failed, they carried on the business under the name of W. L. Wells Co., did not make this association a corporation, *de jure* or *de facto*, but a partnership, and that while they, as such association or partnership, could enforce contracts made with one or more of them under the name of W. L. Wells Company, the actions to enforce such contracts must be brought by them as *individuals*, trading under the name of the W. L. Wells Company, and not in the name of a corporation, which never existed, or, if it existed in an embryonic state, was forbidden to do business because the incorporators had failed to do that which alone could give vitality to the legal entity.

The contention of the defendant is:

1. That the W. L. Wells Company is not a *de jure* corporation of the State of Mississippi; and, therefore, the circuit court of the United States had no jurisdiction of its

actions brought against the defendants, corporations of the State of North Carolina; and the court should have declared upon the evidence bearing upon the first issue, that the plaintiff had failed to establish the affirmative thereof, the same being a jurisdictional fact; and, the court had, therefore, no jurisdiction over the actions.

2. The defendant's further contention upon the first issue is, that if the paying in of the ten thousand dollars of stock was not a condition precedent to the actual existence of this corporation under the laws of the State of Mississippi, yet, the provision in the charter, that the corporation might begin business *when that amount of stock was subscribed for and paid in*, was a prohibition imposed by the State of Mississippi upon the incorporators, forbidding them to make *any* contract or do *any business until that capital was actually paid in*. If that be true, it would seem to follow that no contract made by these three individuals or any one or more of them, in the name of this corporation, can be enforced as a corporate contract in a court.

To hold otherwise would be to declare that the provisions of the charter had no force and effect whatever, except to enable the State of Mississippi, by proper proceedings, to destroy the life which it had expressly said should not exercise its functions *until this thing was done.*

We submit the provision is a wise one, intended to protect not the *State*, which authorizes the existence of the corporation, but the *public*, and those dealing with it as a corporation.

We respectfully submit the facts testified to by John T. Wells, the only witness who has anything to say about this matter, clearly show that this stock, $10,000.00, has not been paid as the law requires payment.

If the association of W. L. Wells, John T. Wells and George Butterworth, was that of stockholders and officers of

a corporation of the State of Mississippi, then the earnings belong to the corporation and not to the individual stockholders. Therefore the individuals who owned the corporation for stock subscribed for could not appropriate any part of this surplus to the payment of their individual liabilities to the corporation until the corporate body had declared dividends; and those dividends, having become the property of the individuals, had been by the individuals applied to the extinguishment of their several liabilities.

In this case, no stock was ever issued, no dividends declared, or paid, no appropriation made, either by the corporation or by the individuals, of these profits and if they exist today, they are still the profits of a business enterprise, either a corporation or a copartnership, and do not belong to the individuals.

This position we insist does not militate against the right of W. L. Wells, John T. Wells and George Butterworth, as partners or joint contractors, to enforce the contracts set out in the pleadings.

Our contention amounts to this and this only:

We insist that these three individuals, assuming to act as a corporation, in the face of the provision of the charter that they should not *commence business until they had paid in ten thousand dollars of capital*, cannot escape the effect of the contracts, made by one of their number in behalf of himself and his associates, by claiming a corporate existence which they were forbidden to assume.

It may be said in this connection, and is, indeed, so maintained by the court in the opinion filed, that the documents introduced in evidence showed that the defendants dealt with the Wells Company, knowing that it claimed to be incorporated, and that, therefore, the defendants are estopped to deny its corporate existence.

This estoppel, if it existed, would not, we submit, have any application to the *first* issue, so far as it involves the jurisdiction of the court. The Federal court, we submit,

cannot acquire jurisdiction of plaintiffs' cause by reason of any estoppel working on the defendant.

This question of the jurisdiction of the court is raised as by plea in abatement. But for the Code practice which obtains in North Carolina, and requires the question raised in this form, pleas in abatement would have been filed by the defendants. In this Code practice there is no plea in abatement as such. The substance of that plea is involved in a simple denial under the Code of the existence of the jurisdictional fact. Therefore, as said above, there is no estoppel.

In this connection, we further submit that no plea or special averment is now required under any system of pleading or procedure in order to raise the question of jurisdiction, because of the change which has been made in the law in that respect by judiciary act of 1875, amended in 1887, as will appear hereafter in the argument upon the law of the case.

We submit, however, that, under the authorities, the W. L. Wells Company was not a *de facto* corporation.

They, we think, are uniform, to the effect, that, there can be no *de facto* corporation, when the individuals, assuming to act in a corporate capacity, do not act *bona fide* in assuming that character.

Good faith is the necessary support of a *de facto* corporation.

Here, the three individuals who, without capital and, therefore, contrary to the law of their corporate existence, took upon themselves, the name of a corporation, and assumed to act as such, and thus, to escape individual liability for their acts, could not, we submit, have been acting in good faith.

The record discloses, we respectfully submit, a violation of the law, and a disregard of the safeguards thrown by the State of Mississippi around its permission to form a corporation, and the evidence discloses, we think, not only a lack of

good faith, but the perpetration of a legal fraud, as it has been denominated. It may not be amiss for the defendants' counsel to state in this brief, that upon the argument before his honor, *the defendants proposed that an amendment should be allowed, so that the individuals composing the partnership should be permitted to carry on this litigation as partners*, by amending their complaints, and alleging that they were partners, and citizens, of the State of Mississippi, the object of the counsel being to secure a trial of the actions *upon their real merits*.

We respectfully submit, upon the evidence, uncontradicted, the court should have ruled that the Wells Company, *as a corporation*, could not maintain these actions.

We call the attention of the court to the suggestion contained in the case of Jones *vs.* Aspen Hdwr. Co., 29 L. R. A., 143, to-wit, that the individuals who had assumed to act as a corporation, in contravention of the law, could have asked, when the facts were fully disclosed, to amend their pleadings and assert their rights *under the contracts* as individual citizens of the State of Mississippi, doing business under the name of the W. L. Wells Company.

His honor, in his opinion, filed after the trial of the case and after the bill of exceptions had been signed, suggested that the effort of the defendants, was, to escape liability in these actions, on a technicality.

In the light of all the evidence, this court will see that the effort of the defendants, was not to escape liability to W. L. Wells, John T. Wells and George Butterworth, doing business under the name of the W. L. Wells Company, but rather to *prevent these individuals from escaping their just liability*, for the action of W. L. Wells, by assuming a character that, under the law, they had no right to assume. We so insisted at the trial on the circuit.

Of course, if this court should hold with the court below that the facts detailed by John T. Wells, constituted the payment for the capital stock, subscribed for by the three indi-

viduals, then the defendants' contention upon the first issue is not sustained, and we come to consider the case as involving the *contract made between the plaintiff*, as a corporation, and the two defendants.

It will be noted that these actions are founded upon *special contracts.*

The plaintiff does not seek to recover the value of cotton belonging to it, which came into the possession of defendants, and was used by them, but *distinctly avers in the complaints a contract, or contracts*, by which the defendants *undertook* and *promised*, to pay to the plaintiffs a certain sum of money for certain property.

We submit that when an action is brought by a corporation upon a contract, made by one of its officers or agents, the *bringing of the suit upon the contract* is a ratification thereof by the corporation and, in such suit, the contract being averred and in a qualified sense, *admitted, the terms of the contract proved* must govern the settlement to be made between the parties by the court.

If, therefore, we can show the court that the defendants have complied with the terms of the contract, under which they received and appropriated to their own use the cotton set out in the exhibits attached to the complaints, then the defendants are exonerated from liability and the plaintiff cannot *adopt by suit or otherwise the contract and escape its terms.*

We come, therefore, to consider, what the contract was between the parties by whom it was made, his authority to make it, and the ratification, if any, of his act by the plaintiff corporation.

The evidence, all of which is printed, discloses the following facts:

W. L. Wells, a citizen of the State of Mississippi, and reputed to be worth from $200,000 to $300,000, carried on, prior to July, 1898, the business of selling cotton to mills in North Carolina under the name of W. L. Wells & Co., and

sold large quantities of cotton, to John F. Love, who was the treasurer and general purchasing agent of the two defendants, The Gastonia Cotton Manufacturing Company, and The Avon Mills, and was also largely interested in the Ozark mills (Record, page 29).

The large business transacted between Love, as treasurer, and Mr. Wells was entirely satisfactory to both parties, and the business for the season ending September 1, 1898, was settled up in full.

In July, 1898, Mr. W. L. Wells and his brother, John T. Wells, and George Butterworth applied to the State of Mississippi for a charter incorporating them under the name of the W. L Wells Company.

John T. Wells and George Butterworth *were men of no means whatever* (Record, page 29).

The contracts for cotton for the season of 1898 and 1899, ending September 1, 1899, were made between John F. Love, representing the defendants, and W. L. Wells, representing the W. L. Wells Company, plaintiff, and that business was finally and fully settled, so that on September 1, 1899, *nothing was due from the defendants to the W. L. Wells Company.*

Prior to this time, John F. Love and George Gray, the latter being the president of the defendant corporations, and associated with Love in the management of these mills, proposed to build near the town of Gastonia a large mill, to be known as the Loray mills, and having this object in view, applied to sundry parties, among them W. L. Wells, to join them in what may be styled the Loray enterprise. Love held out to Wells as an inducement for his joining in the Loray business that, by so doing, *his company could secure the purchasing agency*, not only for the Gastonia Cotton Manufacturing Company and the Avon Mills, *but also for the large mill proposed*; and Love consulted Wells about the location of the Loray mills and urged him to join himself and Gray, in this enterprise (Record, pages 66, 67, 68 and 69).

Wells took part in the consultations about the Loray business and assured Love that he would not only join the enterprise himself, but would also induce, as he thought he could do, some of his friends to join it also in Mississippi.

The amount of interest or stock to be taken in this enterprise by Wells and his associates, was not agreed upon, *but it was distinctly understood*, between John F. Love and Wells that *whatever interest or stock* Wells agreed to take, *should be paid by Love, treasurer, out of the amount, due from the defendants for cotton purchased from W. L. Wells.*

Having this understanding with Wells and consulting him frequently as to the Loray business, John F. Love and his associates had prosecuted the work on the Loray mills, and expended large sums of money in that business.

In May, 1900, Wells, representing, as he always did, his company in North Carolina, came to Gastonia in said State, and at that time examined the location for the Loray plant, and advised with Love about that business (Record, page 30).

During that visit Love and Wells talked of taking the stock in the Loray mills and Wells agreed that he would take $10,000 at any rate and that in certain events he would take $50,000 and expressed the opinion "that a friend of his would take an equal amount." (See pages 66 and 67 of the Record.)

When Wells left Gastonia, after his visit in May, 1900, he was still undecided as to the amount of stock he would take in the Loray enterprise, and said he would go back home and let Love and Gray know what he would do (Record, page 67).

He returned to Mississippi, where the office of the W. L. Wells Company was and *upon their letterhead, wrote the letter of July* 13, 1900, which appears in the record, on page 58, in which occurs the following :

"So, to sum the matter up, you can only depend on me for the original $10,000.00, with a bare possibility of later on increasing it to $25,000.00; but don't depend on the latter.

Hope you are progressing all right. * * * If you can possibly do so, please remit us balance on account, as we need it to settle up matters, which I should like to do before leaving next Wednesday."

This letter, by due course of mail, reached Love at his office in Gastonia a few days after it was written, and shortly after its receipt, Love, taking the invoices of the two mills, as shown on the statements rendered, ascertained that there was due for cotton, from himself as treasurer, $19,206.30, and thereupon he took the invoice marked "Exhibit B," and appearing on page 59 of the Record, and enclosed with it to the Wells Company a check for $9,206.30, having deducted the $10,000.00 mentioned in Wells' letter of July 13th.

Love wrote on the invoice with which this check was sent these words: "Account, $5,923.12."

That invoice, with the check inclosed, was received by the W. L. Wells Company and was marked "Paid Aug. 3, 1900," and returned to John F. Love, treasurer, immediately.

At that time, John F. Love, treasurer, transferred to the credit of the Loray mills, in the Gastonia Banking Company, $10,000.00 on account of W. L. Wells' subscription for stock in that enterprise, the said Loray mills (Record, page 68).

A statement of the account between John F. Love, treasurer, and the Wells Company was sent from Vicksburg on August 1st. It appears on page 53 of the Record.

When that statement was mailed from Vicksburg, the invoice and check for $9,206.30 sent by Love on July 31st, *had not reached the Wells Company in Vicksburg.*

On September 1st, the Wells Company sent to John F. Love, treasurer, the statement which appears on page 54 of the Record, showing a balance due of $12,691.67. That statement gives credit for the $9,206.30 sent by Love on July 31st, but did not give John F. Love, treasurer, credit for

the $10,000.00 which he had paid out under authority of the letter of July 13th, and the contract.

This statement was inclosed in the following letter:

"VICKSBURG, MISS., *August* 31, 1900.

"Mr. JOHN F. LOVE,
"*Treasurer, Gastonia, N. C.*

"DEAR SIR: Inclosed, we beg to hand you a statement of your account to September 1st, showing balance due us $12,691.67.

"May we ask, that you remit us, by return mail, in full, for this balance and oblige.

"Yours very truly,
"W. L. WELLS COMPANY."

Record, page 59.

Upon this letter, Love made the following endorsement, as appears on page 60, of the Record.

Stock Loray mills	$10,000.00
Interest	2,691.67
Balance	$12,691.67

We want to see your Mr. W. L. Wells about it when he comes to see us.

Yours, JOHN F. LOVE, *Treas.*

And Love returned this letter immediately with this endorsement to the Wells Company at Vicksburg, and it was received there by John T. Wells, the secretary and treasurer, and put among the papers of the company, thus notifying the office in Vicksburg, as we insist, that all the principal money had been paid according to the terms of the contract, and that the claim for interest would be adjusted between him and W. L. Wells.

The following statement of all the invoices for cotton sent by the Wells Company to John F. Love, treasurer, is *taken from the exhibits attached to the two complaints*, and it shows that the total quantity of cotton received by the two defend-

ants from the Wells Company up to July 31, 1900, was $147,362.24, and that the cash payments made to that date, including the check for $9,206.30, sent as above stated, *paid every dollar of this indebtedness* except the $10,000.00 which was then paid by the defendants through John F. Love, treasurer, to the treasury of the Loray mills.

CONSOLIDATED STATEMENT.

Avon and Gastonia Mills with Wells Co.

1899.					
Oct. 17.	To 100 B. C.	(Avon mills)	$4,644 72		
19.	" 100 "	(Gastonia mills)	3,884 32		
20.	" 50 "	" "	2,005 04		
20.	" 123 "	" "	5,328 40		
21.	" 100 "	" "	4,011 04		
23.	" 100 "	" "	3,971 60		
27.	" 175 "	(Avon mills)	8,862 79		
28.	" 100 "	(Gastonia mills)	4,082 08		
28.	" 100 "	" "	4,004 16		
31.	" 100 "	(Avon mills)	4,414 01		
Nov. 1.	" 96 "	(Gastonia mills)	3,708 41		
2.	" 50 "	" "	2,121 20		
17.	By cash remittances				22,720 23
21.	To 17 B. C.	(Avon mills)	802 22		
22.	" 86 "	(Gastonia mills)	3,405 44		
24.	" 50 "	" "	1,781 80		
28.	" 203 "	(Avon mills)	9,748 76		
Dec. 2.	" 86 "	(Gastonia mills)	3,313 61		
5.	" 92 "	" "	3,370 37		
6.	By cash remittance				15,203 91
11.	To 100 B. C.	(Avon mills)	5,089 91		
11.	" 229 "	" "	15,618 53		
11.	" 100 "	" "	4,957 29		
13.	" 100 "	(Gastonia mills)	3,892 76		
15.	" 100 "	(Avon mills)	4,574 53		
16.	" 101 "	" "	5,139 69		
21.	" 241 "	" "	10,874 72		
21.	" 30 "	" "	1,639 64		
21.	" 34 "	" "	1,476 32		
22.	" 107 "	(Gastonia mills)	4,023 94		
29.	" 35 "	(Avon mills)	2,445 86		

1900.			
Jan. 3.	To error lbs. in B. C. (Avon mills)...	12 76	
11.	" 25 B. C. (Avon mills).....	1,040 00	
11.	" 77 " " "	3,428 81	
11.	" 50 " (Gastonia mills).....	1,961 93	
13.	By cash remittance.....	....	17,835 00
24.	To 23 B. C. (Avon mills).	931 21	
27.	" 25 " " "	1,172 42	
22.	By cash remittance.....	.....	8,798 32
27.	To 55 B. C. (Gastonia mills)..	2,338 77	
June 22.	" 64 " " ."	3,283 18	
Mar. 3.	By cash remittance.....	.....	20,575 82
12.	" " "	.....	7,308 44
Apr. 9.	" " "	.....	9,714 22
June 5.	" " "	.....	16,000 00
22.	" " "	.....	10,000 00
Aug. 3.	" " "	.....	9,206 30
July 31.	" Am't paid Loray.....	....	10,000 00
		$147,362 24	$147,362 24

An examination of the evidence will show that, from the date of the receipt of the letter which Love returned to the Wells Company in the first part of August, 1900, notifying the company, as we insist, that $10,000.00 had been applied under the direction of Mr. Wells to the payment of a subscription to the Loray stock, *no demand, whatever, was made upon John F. Love, treasurer, or upon either of the defendants for the payment of this balance of* $10,000.00 *until August* 1, 1901, *when the controversy between the parties, which is involved in these suits,* was going on, and was about to culminate in this litigation.

The witness, John T. Wells, was asked to show any letter or statement calling for this balance due, as they now allege, on account of the season ending September 1, 1900, *and he was unable to show any such notice or demand* (Record, pages 31 and 32).

The defendants, therefore, contend, not only that, according to the evidence, their treasurer was justified in taking $10,000.00 of their money, and paying it into the treasury

of the Loray business in part payment of what the defendant companies owed for cotton, purchased by them from W. L. Wells, but also, that The Wells Company, plaintiff, by its *silence and the conduct of its officers*, ratified, confirmed, and acquiesced in what had been done under the contract between their treasurer, John F. Love, and the president, and general manager of the Wells Company, the said plaintiff.

In this connection, we call attention to the relation existing between W. L. Wells and the company, or association known as the W. L. Wells Company.

He was the president and general manager and had charge of all the business in North Carolina, and transacted the same (*supra*). *He was present in court when these* cases were tried. He was sworn as a witness, but was not *put upon the stand. He did not deny any statement made by Love, the treasurer of the companies, as to the agreement between himself and Love, although he had the opportunity to do so. He did not deny that he had authority from his company to transact this business in this way. He did not deny that he had reported this transaction to his associates. He did not deny that he was aware that* $10,000.00 *of the money due for the cotton of the season ending September* 1, 1900, *had been appropriated in the manner detailed above.*

We respectfully submit that the court erred when he declared the transaction above detailed constituted no evidence; that the W. L. Wells Company was bound by the contract between Love, treasurer, and W. L. Wells, its president, as detailed above.

His honor concedes the fact was established, that Wells, the president, and Love, the treasurer, had made the agreement as Love states it, and that Love, as treasurer of the two defendants, had paid this $10,000.00 into the Loray treasury, but he says, in effect, that Love in this matter acted without authority, and his companies, defendants,

must lose the money that he paid out under these circumstances.

We insist the proof is clear and positive, that the transaction was proper; that Love, treasurer, had authority from the plaintiff's proper officers to make this appropriation of this fund; and, at any rate, the evidence was such as to require that the court should submit the question to the jury, and especially that he should have submitted the question whether or not the Wells Company ratified the appropriation of this sum to the Loray business.

The subsequent conduct of John T. Wells, as will appear hereafter in this brief, the secretary and treasurer of the Wells Company, goes also to show his company's ratification of this appropriation of this sum.

The defendants say they have thus established the allegation of the answer or offered evidence, reasonably sufficient to establish it, that on August 3, 1900, *they made a full and final settlement with the plaintiff.*

The evidence discloses the fact that all the invoices charged against the defendants up to July 31, 1900, were produced on the trial, and each one of them was marked "Paid W. L. Wells Company," except those covered by the $10,000.00 paid to the Loray mills.

John Love might, therefore, reasonably ask, we think, as he did, that the claim for interest on these invoices might be left open for adjustment between himself and the president and general manager.

We come now to consider the allegation made in the answer of the defendant, to the effect that another settlement was made between the plaintiff and these defendants on December 3, 1900, or about that date.

It will be remembered that the cotton season of 1900 and 1901 began on September 1st.

The testimony of JOHN T. WELLS in regard to this settlement, is found on pages 24 and 25 of the testimony, and is as follows:

Q. "Look at Exhibit J and see if the invoices we have mentioned amount to $40,357.59?"

A. "Yes, sir; that is right."

Q. "Look at Exhibit J and see what figures and words on that exhibit are in the handwriting of J. F. Love?"

A. "Total $40,357.59, less check $25,000.00, inclosing $15,357.59."

Q. "When John F. Love, treasurer, returned you that invoice with those words and figures written on it by himself, what did he send you with it?"

A. "A New York exchange for $15,357.59."

Q. "Is the check I hand you the check inclosed?"

A. "Yes, sir."

Q. "Is the check I now hand you the check for $25,000 spoken of in Mr. Love's statement on that invoice?"

A. "Yes, sir."

Q. "Did that check, inclosed with that voucher pay all the invoices that were then due and some that were not due?"

A. "It paid all the invoices of the Gastonia Manufacturing Company up to and including November 5, 1900, and all of the Avon mill up to and including November 2d."

Q. "That is, if I understand you, it covered all the invoices that were due thirty days after the dates you have given."

A. "Yes, sir."

Q. "And the check inclosed with that invoice was received by you December 3, 1900, in Vicksburg?"

A. "Yes, sir."

The Exhibits J, Q, and R, mentioned in this testimony, will be found on page 61 of the Record.

We respectfully submit that this testimony of the secretary and treasurer of the plaintiff company, the only witness put by it upon the stand, shows clearly two things:

1. That there was a complete settlement on December 3, 1900, of all the business transacted between the plaintiff

and John F. Love, treasurer, in the season of 1900 and 1901, and that the defendant companies paid, on December 3d, in full, every invoice that was then due. Indeed, a careful examination of the dates of the several invoices will show that John F. Love, treasurer, anticipated, by a few days, some of the payments.

This evidence shows further that John T. Wells, secretary and treasurer of the plaintiff company, then knew that the $10,000.00 which he now alleges was due from the defendants on the business of 1899 and 1900, had been settled by the payment made to the Loray mills, as heretofore stated.

The following statement, the items of which, are all taken from the exhibits attached to the *complaints*, shows how the settlement of December 3d was made, and what application the plaintiff made of the $25,000.00 check sent to W. L. Wells on November 21st.

AVON AND GASTONIA MILLS—WITH WELLS CO.

Consolidated Statement from Aug. 3 to Dec. 3, 1900.

1900.			
Oct. 2.	To 50 B. C. (Gastonia mills)	$2,814 13	
" 11.	By cash		$2,814 13
" 11.	To 50 B. C. (Gastonia mills)	2,764 19	
" 20.	To 50 B. C. (Gastonia mills)	2,660 67	
" 23.	To 50 B. C. (Avon mills)	3,283 48	
" 25.	To 100 B. C. (Gastonia mills)	5,263 89	
" 29.	By cash remit'ce $2,764.19, $2,660.67		5,424 86
" 29.	To 50 B. C. (Gastonia mills)	2,648 80	
" 31.	To 150 B. C. (Avon mills)	11,428 89	
" 31.	To 50 " " "	3,281 00	
Nov. 2.	To 50 " " "	2,764 52	
" 5.	To 100 " " "	6,492 42	
" 5.	To 100 B. C. (Gastonia mills)	5,193 92	
" 21.	By cash remittance		25,000 00
	By check to balance		15,357 59
		$48,596 58	$48,596 58

We come next to inquire under what contract or agreement between John F. Love, treasurer, and W. L. Wells, the purchases of cotton for the season of 1900 and 1901, were made.

On page 68, Mr. Love, whose testimony is not contradicted, testified as follows:

Q. "Go on in your way and state what conversation occurred between you and Mr. Wells in regard to buying cotton for the season of 1900 and 1901, and what conversation you had with him in regard to his taking interest in the Loray mills?"

A. "Mr. Wells made us a visit and was with us a couple of days and, during his visit we spoke of cotton, as usual, and also spoke of the Loray mills. We told him that we would like for him to continue buying our cotton, as before, and if he carried out the agreement about the Loray stock, we wanted him to continue buying our cotton, but that we had an offer from another party, who would become interested with us, but that we would give him the preference before making the other trade."

Q. "What did he reply to that?"

A. "He said, after talking with him, that he would take the stock, the balance we first talked, about the $50,000.00, and that he would go home and let me know in a few days. In the meantime we had to have some cotton, and he went on home and commenced shipping us cotton."

Q. "What was the condition of the Loray mill at that time?"

A. "The buildings were going up, and I think we had two hundred tenement houses erected."

Q. "Did he see that property?"

A. "Yes, sir."

Q. "Talk to you about it?"

A. "Yes, sir."

Q. "Did you or did you not, advise him about the business?"

A. "We did."

On page 70 of the Record, Mr. LOVE was asked the following questions:

Q. "Anything said in his visit here about the cotton payments?"

A. "Yes, sir; he wanted to know how we wanted to pay for the cotton."

Q. "What was agreed?"

A. "I told him we would pay for it along as usual, make our regular monthly payment, and whatever stock he took, was to be taken out of this."

It will be remembered that the agreement as to paying for the cotton by paying for the Loray stock was agreed to between Wells and Love prior to July 13, 1900, as heretofore stated in this brief.

Mr. Wells, it seems, returned to Vicksburg, where the principal office of the plaintiff was, and where John T. Wells resided, and on October 4th he wrote to John F. Love the letter of that date, which is so important in its bearing upon this controversy that we here copy it in full:

"VICKSBURG, MISS., *October* 4, 1900.

"Mr. JOHN F. LOVE, *Gastonia.*

"DEAR MR. LOVE: In reference to the Loray matter, I have arranged to take the $50,000.00 stock, but want you, as stated when there, to let this come in on the last payments say about 1st January next. This will enable me to clean up my deal I wrote you about last spring, and besides, for the next 90 days I will be crowded somewhat for money to carry on my business. I am going to make a change in my present firm after this season, so don't want my arrangements with you and the Loray known to them, hence in writing me about this, please mark your letters (76) 'Personal.'

"Please keep me posted about how the Loray is progressing. With regards to Mr. Gray, I am,

"Yours truly, W. L. WELLS."

It will be noted that in this letter, Wells, referring to the interview between himself and Love, when the contract for

the purchase of this cotton was made, states *that he will take the whole sum of* $50,000.00 *in stock, and especially requests that it shall be paid for out of the January payments for cotton.*

The proposition contained in this letter as to the time when the stock should be paid for was agreed to by Love on behalf of the defendants, and in consequence of that agreement, the settlement of December 3d heretofore set out, was made by him.

We respectfully ask the court to note that when the check for $25,000.00 was sent to the plaintiff company, on November 19th (Exhibit R, page 61), no direction was given as to the application of this fund.

On page 69, it appears that Love was asked:

Q. "Did you send him a check for $25,000.00?"
A. "Yes, sir."
Q. "Why did you send that check?"
A. "He had been shipping us some cotton and wanted us to make a payment on it."
Q. "Did you direct how that should be applied?"
A. "No, sir."

And, on page 70:

Q. "What application was made with that $25,000.00?"
A. "In payment of the bills inclosed."
Q. "The bills were dated what date?"
A. "The bills were dated in October and November, 1900."
Q. "Was any part of it applied on the bills of the season of 1899 and 1900?"
A. "No, sir."
Q. "Did they send you any notice that the balance was due?"
A. "No, sir."

We submit that these facts have a bearing upon the payment of the $10,000.00 in July, and certainly were sufficient in their effect to make it necessary and proper that the jury should be allowed to pass upon the question whether the

plaintiff company had not, by its conduct, ratified the appropriation of $10,000.00 to the Loray matter.

Having thus, we think, shown from the evidence the allegation of the answer, to wit, that the defendant companies made a full settlement with the plaintiff through its proper officers, on August 3, 1900, and again on December 3, 1900, it remains to inquire what transactions took place after the latter date.

On page 70, it appears that this question was asked the witness, Love:

Q. "How much was due from your two companies to the Wells Company, in December, 1900, after this $15,357.59 payment was made?"
A. "$40,681.08."
Q. "Have you the invoices constituting this gross sum?"
A. "Yes, sir."
Q. "What did you do with the $40,000.00?"
A. "I placed it to Mr. Wells' credit for Loray stock."
Q. "Was that sum paid to the Loray Mills treasury by you?"
A. "Yes, sir; in cash."
Q. "What became of it?"
A. "It was expended in the work of the mill."
Q. "Have you the books, showing that payment?"
A. "Yes, sir."

The fact that Love, treasurer, paid into the Loray treasury this $40,000.00, just as he had theretofore paid into this treasury the $10,000.00, is fully established by the evidence in the case, and seems to be conceded in the opinion which the court filed.

We take it, therefore, that the controversy is not as to the *fact of these payments* into the Loray treasury, but as to the *authority of the defendant companies to make these payments, and to demand credit therefor.*

The following statement, taken from the exhibits attached to the complaint, except the item of $40,000.00, and the item of $688.08, shows how the account between the plaintiff and

the two defendants stood after the $40,000.00 was paid to the Loray treasury, and, below on this statement, is a full account of what the defendants admit to be due the plaintiff, including the balance of $688.08:

AVON AND GASTONIA MILLS WITH WELLS CO.

Condensed Statement from December 3, 1900, to January 3, 1901.

1900.					
Nov.	15.	To 50 B. C. (Gastonia mills)	$2,637 84		
"	21.	To 100 " " "	5,190 82		
"	24.	To 100 " " "	5,276 24		
"	24.	To 118 B. C. (Avon mills)	6,515 36		
"	26.	To 100 B. C. (Gastonia mills)	4,862 35		
"	26.	To 100 B. C. " "	4,954 48		
"	28.	To 100 B. C. (Avon mills)	5,598 14		
"	28.	To 100 " " "	5,675 35		
"	20.	By overcharge ft. (Gastonia mills)			22 50
Dec.	31.	By amount paid Loray mills			40,000 00
		Balance			688 08
			$40,710 58		$40,710 58
Dec.	31.	To balance	$688 08		
"	4.	To 24 B. C. (Gastonia mills)	1,229 13		
"	18.	To 100 B. C. " "	5,381 28		
"	20.	To 83 B. C. (Avon mills)	4,862 89		
		By overcharge ft. (Gastonia mills)			13 03
		Balance			12,148 35
			$12,161 38		$12,161 38
		Gastonia mills owe	7,285 46		
		Avon	4,862 89		
			$12,148 35		

The attention of the court is called to the letter written by Love to W. L. Wells on February 2, 1901, and also to the letter of February 5, 1901, pages 62 and 138 of the Record, and to the fact that the *defendant corporations were not called upon* to pay either the $10,000.00 of the season of 1899 and 1900 nor the $40,000.00 paid to the Loray treasury

in the season of 1900 and 1901 *until the Loray enterprise had gotten into trouble and the interest taken therein was worth less than par.* Then, *for the first time these defendants are informed* that W. L. Wells, the president and manager of the plaintiff corporation, had no power to make the contract he made, and the position is taken that the defendants must suffer the loss, if any, sustained by this investment in the Loray enterprise rather than W. L. Wells or his corporation, the plaintiff in this action.

As to the authority of W. L. Wells, not only as president but as general manager, we refer the court to pages 27, 28, 29 and 30 of the printed record.

On page 30, John T. Wells, testifying as to the relation of W. L. Wells to the plaintiff company, made the following statements:

Q. "Was he allowed interest on the capital which he furnished the company?"
A. "No, sir; he didn't furnish any capital; he loaned them some money."
Q. "Did he furnish any credit?"
A. "Yes, sir; he furnished most of it."
Q. "Won't you say he did all of it?"
A. "No, sir."
Q. "Who did, if you and Mr. Butterworth were insolvent?"
A. "We had a reputation of being honest."
Q. "I will ask you if Mr. W. L. Wells was not the head of the concern, and all of the W. L. Wells Company?"
A. "No, sir; he was not."
Q. "In what particular was he not?"
A. "He didn't have the entire management of it, and he didn't furnish everything."
Q. "What didn't he have control of?"
A. "He didn't have entire control of anything."
Q. "What did he not have control of?"
A. "The making of contracts, the selling of cotton and everything else."
Q. "Didn't he generally make the contracts?"
A. "He did sometimes."
Q. "Did you travel at all for the company?"
A. "No, sir."

Q. "Did Butterworth ever travel for the company?"
A. "He did, in the country, to buy cotton."
Q. "Who transacted all the business of the W. L. Wells Company in North Carolina?"
A. "W. L. Wells."
Q. "You had nothing to do with it?"
A. "No, sir."
Q. "Nor Butterworth?"
A. "No, sir."
Q. "Your business was simply to receive the money and pay it out as Mr. W. L. Wells directed it?"
A. "No, sir."
Q. "Under whose direction did you pay it out?"
A. "Under the direction of a consultation between us. We advised as to the policy of the business."
Q. "Did you advise about the policy of the business in North Carolina?"
A. "Yes, sir."
Q. "When?"
A. "From time to time."
Q. "In the meeting of the directors?"
A. "Yes, sir. We might call a meeting of the directors, W. L. Wells and I. We were the directors and officers and conducted the business."
Q. "You kept up with the business of the company?"
A. "Yes, sir."
Q. "Did you ever refuse to ratify any act that W. L. Wells did for the company?"
A. "No, sir."
Q. "Did you ever object to any act that W. L. Wells did for the company?"
A. "Yes, sir."
Q. "Can you recall one act?"
A. "No, sir."

The undisputed evidence discloses the fact that the contract between W. L. Wells and John F. Love for the sale of the cotton, the price of which is sought to be recovered in this action, was very profitable to the plaintiff (Love's evidence, p. 71, and Craig's evidence, p. 109), and that one of the material inducements to Love for making this contract

was the agreement by Wells to subscribe for $50,000.00 of the stock of the Loray mills, which was to be paid for from the proceeds of the sale of said cotton (Love's evidence, pp. 63, 69, 70, 96, and Exhibit S).

With notice that the defendants below relied upon the terms of this contract as authority for paying the $50,000.00 to the Loray mills on said stock subscription, and without any offer to return the profits made by the sale of said cotton, the plaintiff below brought these actions (W. L. Wells having sworn to the complaints, p. 4), and prosecuted them to final judgment in the circuit court, and still insists that it is entitled to recover the price of said cotton, delivered pursuant to this special contract, thereby attempting to repudiate only so much thereof as required Wells to subscribe for the Loray stock and authorized Love to apply part of the purchase price of the cotton in payment therefor.

Specification of Errors Relied upon.

The first, second, third, fourth, and fifth exceptions are as follows:

First Exception.

The defendant thereupon moved to dismiss the action, because the court, as appears from the testimony, has no jurisdiction thereof, there being no evidence introduced to show that the plaintiff, W. L. Wells Company, was, at the time this action was brought, or is now, a corporation duly created and organized or invested with the right to bring this action under the laws of the State of Mississippi, and that the plaintiff has no legal capacity or right to sue in this court, and upon the further ground that the plaintiff's testimony shows that the plaintiff has no legal capacity to sue in this court, and that this court has no jurisdiction of the action.

Second Exception.

The testimony in the case here closed, and the defendant thereupon renewed its motion to dismiss the complaint, or for judgment, as in case of nonsuit, under the acts of assembly of the State of North Carolina above recited.

Third Exception.

The defendant then moved to dismiss the action, for want of jurisdiction in the court, upon the grounds which were assigned at the close of the plaintiff's testimony, the plaintiff not being a citizen of a State different from that of the defendant.

Fourth Exception.

The court charged the jury that, upon the evidence in the case, the first issue should be answered "yes," and directed the jury so to answer that issue.

Fifth Exception.

The court charged the jury that, upon the evidence, the second issue should be answered "yes," and directed the jury so to answer that issue.

These five exceptions involve two points: First, that the evidence did not show the plaintiff to be a corporation, duly created and organized under the laws of the State of *Mississippi*; and, second, that the evidence did not show the plaintiff had the capacity to make and enforce the contract set out in the complaints; but, on the contrary, discloses the fact that it had no such capacity.

The sixth exception is as follows:

Sixth Exception.

The court charged the jury that, upon the evidence, the third issue should be answered "yes," and that plaintiff was entitled to recover the full amount demanded in the complaint, with interest, and directed the jury to answer the issue accordingly.

This exception involves the question whether plaintiff is bound by the stipulation in the contract as to the subscription for the stock of the Loray mills, either originally or by ratification and acquiescence.

The substance of this exception is that the court erred in his instruction to the jury, that there was no evidence, reasonably sufficient to establish the fact of payment by the defendant of fifty thousand dollars, or any other sum, for the Loray stock as alleged in the answer, for and in behalf of the plaintiff, W. L. Wells Company.

All the questions thus presented by the exceptions will be considered in the following order:

Syllabus of Argument.

I.

The question of jurisdiction.

A. The plaintiff was not a *de jure* corporation, as it had not been organized under the Mississippi statute. No stock had been paid for, even if John T. Wells' testimony is taken as true. The pretended payment was not even colorable.

B. It is not sufficient to give this court jurisdiction, that plaintiff below is a *de facto* corporation, or to be considered as a corporation, by reason of an estoppel.

C. The question of jurisdiction is properly presented by the pleadings.

D. If the question of jurisdiction is not presented by the pleadings, the court should have taken notice of the question under the judiciary acts of 1875 and 1887, if the want of jurisdiction as to the person or subject-matter appeared, at any time or in any manner, in the course of the trial.

II.

The plaintiff had no power to contract or to sue upon alleged contracts.

III.

The plaintiff below is bound by the contract made by W. L. Wells, and the defendant is entitled to a credit on the purchase-money, by reason of the subscription to the stock.

A. The taking of the stock in part payment of the price of the cotton was not *ultra vires*.

(1.) The taking of the stock, by the defendant, in part payment of the price, was a mere incident of the transaction in regard to the sale of the cotton, and, therefore, was *infra vires*.

(2.) If the taking of the stock in part payment of the price of the cotton was not a mere incident of the sale by plaintiff to defendant, and, therefore, *infra vires* originally, the contract, as between Wells Company and the defendant was fully executed, and the doctrine of *ultra vires* did not apply. The cotton had been sold and delivered and the money actually paid by defendant to the Loray mills for the stock.

B. W. L. Wells had original authority to make the contract, including the stipulation as to the stock of the Loray mills.

C. The contract was ratified by the subsequent dealings and correspondence between the parties, as shown by the oral evidence and exhibits.

(1.) The plaintiff received a benefit from the sale of the cotton, in the way of large profits, which they retain, and having thus ratified that part of the contract which favored them, they thereby ratified the whole.

(2.) The plaintiff had notice of the terms of the contract between defendant and its agent, W. L. Wells, and did not repudiate the same, but acquiesced therein by its silence.

D. The plaintiff below ratified the contract by bringing this action for the purchase price, as fixed by the contract, and also by continuing to maintain and prosecute this suit, with knowledge of the terms of the contract in regard to the stock.

IV.

The judge had no power or right to withdraw the consideration of the case from the jury and peremptorily to direct a verdict, in view of the evidence submitted in the case, even under the practice prevailing in the Federal courts. The evidence more than reasonably tended to establish the plea of payment or the defense as to the credit for the stock subscription, and should have been submitted to the jury.

The Question of Jurisdiction.

A. The plaintiff was not a de jure corporation, as it had not been organized under the Mississippi statute. No stock had been paid for, even if John T. Wells' testimony is taken as true. The pretended payment was not even colorable.

The articles of incorporation (page 40 of Record) provide as follows:

"The capital stock of said corporation shall be $50,000.00, divided into shares of $500.00 each, and, as soon as $10,000.00 of said stock is subscribed and paid for, said corporation shall have power to commence business."

It is admitted that no payment was made on the stock subscription by W. L. Wells, John T. Wells or George Butterworth, except as testified by John T. Wells.

There was no payment on the subscription during the first year after the articles of incorporation were filed and the certificate was issued. It is contended, however, that, during that year, there was a large profit made in the business, and, at the end of the year, this profit or the accumulated earnings far exceeded the amount of the payment required to be made by the articles of incorporation. No meeting of the corporation was ever held to declare a dividend, and no resolution ever passed, directing that the profits or any part of them should be paid to the several stockholders as dividends or otherwise. This profit remained on the books of the company to its credit, with the exception of the amounts drawn by the several persons composing the company, whether a corporation or partnership, for their own private use and benefit. Not a dollar was applied to the payment of the stock subscriptions by any resolution or other formal action of the company, or of any persons representing it, nor is there any entry on the books of the company, showing

any such application of its funds. In view of these facts, how can it be contended that there has been any payment? Surely the dictum of the witness, John T. Wells, did not prove it or tend to prove it, when he admits that no formal action was taken by the company. If he had testified that the necessary amount had been paid on the subscriptions and then stopped, there may have been some evidence to show payment, but he tells us what he meant by payment, and what he tells us is not sufficient in law to constitute payment.

"A shareholder in a corporation has no legal title to the property or profits of the corporation until a division is made. He has no inchoate or other right until the dividends have been declared."

Queen vs. Arnaud, 9 Ad. & El. (N. S.), 806.
Brown vs. Collins, L. R., 12 Eq. Cases, 594.
Van Allen vs. Assessors, 3 Wall., 573.
Hyatt vs. Allen, 56 N. Y., 557.
Minot vs. Paine, 99 Mass., 101; 96 Am. Dec., 705.
City of Utica vs. Churchill, 33 N. Y., 237.

Profits, until a division is made, are assets of the corporation, and not income due the stockholders.

Waterman vs. Alden, 42 Ill. App., 294.

It is not pretended that any of the members of the company paid anything on the stock subscriptions out of their own pockets. The only contention that can be made is that, by reason of accumulation of profits of the business during the first year, there were sufficient assets to pay the required amount on the subscriptions for stock. But this fund belonged to the company and could not be applied to the payment of stock subscriptions without its consent and without some formal action taken by it. Unless this was done, "the incorporation of the company could not be effected."

R. R. vs. Mason, 16 N. Y., 451–456.
Jersey City Gas Co. vs. Dwight, 29 N. J. Eq., 242.

If there was no payment for the subscriptions for stock, there was necessarily no proper organization of the corporation, under the laws of the State of *Mississippi*, and, therefore, the circuit court had no jurisdiction, even though the defendant was estopped to deny the general corporate existence of the plaintiff.

Morawetz on Private Corporations, section 267, first edition. "Subscription, made without deposit, is void." This author, cites many cases, in support of this, amongst them, Fiser *vs.* Miss. Central Railroad Co., 32 Miss. Rep., and Barrington *vs.* Miss. Central, 32 Miss. Rep. On pages 40, and 41, of the Record, are to be found the charters of incorporation, of the W. L. Wells Company. Section 2, of these charters, is as follows:

"The capital stock of said corporation shall be fifty thousand dollars, divided into shares of five hundred dollars, each, *and as soon as ten thousand dollars of said stock, is subscribed, and paid for* said corporation shall *have power* to commence business."

There is no denial of the fact, that *this sum was not paid as provided in the charters.*

"A corporation may begin business, *as soon as the amount fixed by its articles of incorporation, has been paid.*" The American Corporation Legal Manual, 1902, page 301.

This is the statute law of Mississippi. This provision in the charter, the payment of the subscription, is mandatory.

"In forming a corporation under a general enabling act, it is necessary *that all* of the *mandatory provisions of the statute, should be substantially complied with.*"

Beach, on Private Corporations, page 18, section 12, vol. 1, and cases, cited, by the author.

"There is a broad and obvious distinction between such acts as are declared to be necessary steps in the process of incorporation, and such as are required of the individuals

seeking to become incorporated, but which are not made requisite to the assumption of corporate powers. In respect to the former, *any material omissions, will be fatal to the existence of the corporation, and may be taken advantage of, collaterally, in any form in which the fact of incorporation can properly* be called in question."

There is a distinction "between cases, when a corporation is created by *special charter*, and there has been user, *and where individuals seek to form themselves into a corporation, under a general law.*"

"*In the latter case, it is only in pursuance of the provisions of the enabling act, that corporate existence can be acquired.*" In this case, an incorporation, by general law,—an enabling act,—one of the provisions, was, THE ACTUAL PAYMENT OF TEN THOUSAND DOLLARS. Beach on Private Corporations vol. 1, page 26, section 16, and cases, cited by the author.

Where individuals become a corporation, under provisions of a *general statute*,—an enabling act—the law requires a strict measure of compliance, with these statutory provisions.

"It is immaterial, that the persons, attempting incorporation, have acted in good faith, and have actually carried on business, under their supposed authority to act, as a body corporate."

Beach on Private Corporations, page 27, section 16.
Biglow vs. Gregory, 73 Ill., 197.

The Biglow case, cited here, is quoted from, by Adams, chief justice, in Kaiser *vs.* Lawrence Savings Bank, 56 Iowa, 104, reported, also, in 41 American Rep., page 85.

Indeed, the quotations, from Beach, above, are copied, almost literally, from these cases.

In the case of Kaiser *vs.* Lawrence Savings Bank, above, itself, a leading case, the court cites many cases, among them, the Biglow case, saying:

"This is a late decision, and seems to have been made, with a full recognition of the authorities, claimed, to hold an adverse doctrine."

We invite the court's attention, especially, to the case of Kaiser *vs.* Lawrence Savings Bank, 41 American Rep., 85. So far, is the doctrine, we refer to, here, carried, that, it is held,

"A corporation, defectively organized, can pass no title to property held by it, as its own."

Hicks *vs.* Converse, 37 La. Ann., 484, cited by Beach in the section above referred to.

I.

B. It is not sufficient to give the court jurisdiction, that the plaintiff is a de facto corporation, or a corporation by reason, merely, of an estoppel. It must be a de jure corporation.

The Federal courts have only limited jurisdiction, authorities and powers are strictly statutory. They can acquire jurisdiction of a case only in the manner pointed out by the statute.

Farrington vs. Pillsbury, 114 U. S., 138.

The statute requires that the plaintiff shall be a citizen of a State other than that of defendant, but there must be diverse *citizenship*.

A corporation can become a citizen within the meaning of this statute only by being duly chartered and organized under the law of the State of its origin.

The right to sue in the Federal court must depend upon the legal status of the plaintiff as a citizen, and not upon any estoppel arising out of the particular nature of the transaction involved in the suit. Otherwise, a plaintiff might be permitted to sue as a corporation when it had not been legally created and organized and was not, in fact, a citizen. It cannot be a citizen in one case and not in another, in the same court. It cannot be a citizen for the purpose of suing in contract, and not a citizen for the purpose of suing in tort or in a case where no estoppel could arise by reason of

the nature of the transaction upon which the action is based.

But we have already shown that plaintiff is not even a *de facto* corporation, and also that defendant is not estopped by any dealings with plaintiff to show that there is no corporation.

I.

C. The question of jurisdiction is properly raised by the pleadings.

While it is not the law that objection to the jurisdiction in such a case as this must be taken by a plea in abatement since the passage of the judiciary acts of 1875 and 1887, as will be shown in this brief hereafter, yet, if such was the general rule, as it was under the judiciary act of 1789, it would not apply to this case, as questions of pleading and procedure are governed by the statutes of the State where the suit was brought, and, under the statutes of North Carolina and the practice and procedure of its courts, there is no such thing as a plea in abatement.

The Code of North Carolina provides that when the want of jurisdiction appears on the face of the complaint, the objections to the jurisdiction must be taken by demurrer.

Code, section 239:

Objection to the jurisdiction "is not the subject of a plea at all."

Flack vs. Dawson, 69 N. C., 42.
Bank vs. Brittain, 66 N. C., 365.

When the want of jurisdiction does not appear on the face of the complaint, the objection to the jurisdiction should be taken by answer. When, therefore, the complaint makes the necessary averments, the question of jurisdiction can be raised by an answer merely denying these averments of the com-

plaint (Code, sec. 240), because, if the averments are not true, the court is without jurisdiction. It is only necessary to state the facts, affirmatively, in the answer when there is no allegation as to jurisdiction in the complaint, and this can never be necessary in the Federal courts, as the plaintiff, is required to allege the jurisdictional facts, and a general denial of them, is equivalent to a statement in the answer that the facts do not exist, which is the substance of a plea in abatement.

Forms of pleading, are abolished in North Carolina, and the only pleadings, are complaint, demurrer, answer, and reply, and the court is required to pass upon any material question presented, without regard to the form or manner in which it is presented, and all pleadings must be liberally construed.

Code, sections 133, 260, and 276.

The Federal courts follow the statutes and decisions of the courts of the State where the action is brought, with reference to the form and order of pleadings, and the manner in which objection to the jurisdiction of the court shall be taken.

S. P. Co. vs. Denton, 146 U. S., 202, and cases cited.

The question we have here is expressly decided in Roberts *vs.* Lewis, 144 U. S., 651, and it is there held that a general denial in the answer of the allegation of citizenship in the complaint, is sufficient, under the Code practice and procedure, to raise the objection *to the jurisdiction and takes the place of a plea in abatement.*

In the case at bar, the defendant specifically "denies the allegation," in the complaint, that the plaintiff is a corporation of Mississippi.

Upon this denial, the court framed the issue, as follows:

"1. Is plaintiff a corporation," as alleged in the complaint?

This issue was joined, as upon a plea in abatement, because it went to the person of the plaintiff.

Emerson Co. vs. Nimmocks, 88 Fed. Rep., 281.

As before explained, in this brief, the answer, under the Code, denied the allegation of the fact, which gives jurisdiction to the court, known as a jurisdictional fact. It would, under the practice, before the enactment of the Code, in North Carolina, have required a plea in abatement to raise the question now raised, by a denial of this jurisdictional fact, to-wit: that "plaintiff is a corporation of Mississippi." It would have been the same, but for the judiciary acts of 1875 and 1887, in the Federal courts. The necessity of the plea in abatement has been abolished by these acts of Congress; anyhow, the Code practice in North Carolina, is that of the circuit court held in that State.

As we submit, the office of the plea was to deny the jurisdictional fact. In the traverse of the first paragraph of the complaint, that office is subserved, the object of the old plea, in abatement, accomplished under the Code practice.

This denial raised the issue as above set out. The plaintiff offered evidence upon this issue, the evidence heretofore recited in this brief. The burden of proof was upon the plaintiff on this issue. Upon, and in the light of this evidence, the foregoing argument and citations are submitted. There can be no estoppel, as before observed.

So, we submit, that this court has no jurisdiction, because there is no "corporation created and organized under the law of Mississippi."

The provision requiring payment of the ten thousand dollars, is mandatory; and we insist, that, in passing upon the question of whether there is a corporation, it is, as upon the old plea in abatement, and wholly regardless of the facts of the case, the merits, or, any dealing or contracts, between the parties. Estoppels of this kind, do not apply to pleas in

abatement; or issues, raised upon facts, which go to the jurisdiction of the court, under the Code of North Carolina.

It is to be observed, that the second issue, is substantially similar to the first. We submit, that if there had been a plea in abatement, as under the old practice, the court would have decided that issue, so raised by the plea, upon the evidence offered upon the same, by the plaintiff, and only upon that. That evidence did not include, or embrace, any of the alleged dealings, between the parties. That being so, there could be no estoppel, as claimed in the opinion of the court, filed, since the bill of exceptions was signed, as before suggested.

Under the practice in North Carolina, there is no plea in abatement, and as this point could not be raised by demurrer, it not appearing upon the face of the complaint, it could only be, by answer, which is a "general or specific denial, of each material allegation in the complaint, etc." Sec. 243, Code N. Car., page 93.

The issue is raised as required by the code, in the said section, 243. We submit, therefore, "the circuit court had no jurisdiction of this action." If there had been no denial, of this jurisdictional fact, by what is the same, as a plea in abatement, we submit, that, inasmuch as the payment of this sum of ten thousand dollars, is an "*act, declared to be a necessary step, in the process* of incorporation," under the laws of Mississippi, "its omission is fatal, to the existence of the corporation, and may be taken advantage of, collaterally, in any form in which the fact of incorporation" can be called, properly, in question. Beach on Private Corporations, sec. 16, vol. 1, page 26.

This is so, because, it was "*only in pursuance, of the provision, of this enabling act, that plaintiff's corporate existence is acquired.*" *Ibid.*

Third Street and Suburban Railway Co. *vs.* Lewis, 173 U. S. Rep., 457; King Bridge Co. *vs.* Otoe Co., 120 U. S. Rep., 225.

In the above case of King Bridge Company, Justice Harlan, quoting from Mansfield, etc., Railway Co. *vs.* Swan, 111 U. S., 379, 382, says:

"The rule springing from the nature, and limits of the judicial power of the United States is inflexible, and without exception, which requires this court of its own motion to deny its own jurisdiction, and in the exercise of its appellate power, that of all other courts of the United States, in all cases, where such jurisdiction *does not affirmatively appear* in the record, on which, in the exercise of that power, it is called to act. On every writ of error or appeal, the first and fundamental question, is, that of jurisdiction, first, of this court *and then of the court, from which the record comes*" (Italics, *ours*).

All United States courts are *statutory courts*, upon the records, of which, jurisdiction must affirmatively appear.

I.

Williams vs. Nottaway, 104 U. S. Rep., 209.
Farrington vs. Pillsbury, 114 U. S. Rep., 138.

D. If the question of jurisdiction is not raised expressly by the pleadings, the court should have taken notice of the question, under the judiciary acts of 1875 *and* 1887, *if the want of jurisdiction as to the person, or subject-matter, appeared at any time, or in any manner, in the course of the trial.*

It was held, under the judiciary act of 1789, that the objection to the jurisdiction must be raised by a plea in abatement, but the Supreme Court of the United States has repeatedly decided that, since the judiciary acts of 1875 and 1887, a plea is not required because, by those acts, it is made the duty of the court, to inquire, into its own jurisdiction, and if it shall appear, in any way, that the court has no juris-

diction, in the particular case, the court should dismiss the action.

Act of March 3, 1875, 18 Statutes at Large, 470.
Act of March 8, 1887, 24 Statutes at Large, 373.

In construing these statutes, the Supreme Court, of the United States says:

"While under the judiciary act of 1789, an issue as to the fact of citizenship could only be made, by plea in abatement, when the *pleading properly averred the citizenship*, of the parties, the act of 1875 imposes upon the circuit court, the duty of dismissing a suit, if it appears at any time, after it was brought and before it is finally disposed of, that it does not really and substantially, involve a controversy of which it may properly take cognizance, and the statute does not prescribe any particular mode, in which such fact may be brought, to the attention of the court. *It may be done by the affidavits; or, the depositions, taken, in the case may be used for that purpose.*"

Morris vs. Gilmer, 129 U. S., 315.
N. & L. R. R. vs. B. & L. R. R., 136 U. S., 356.
Lake Co., Com'rs, vs. Dudley, 173 U. S., 254.
K. I. B. & M. Co. vs. Otoe, 120 U. S., 225.
Farrington vs. Pillsbury, 14 U. S., 138.
Williams vs. Nottaway, 104 U. S., 209.

"Whether the court whose judgment has been brought here for review had or had not jurisdiction, is a question which this court must examine and determine, *even if the parties forbear to do it, or consent that the case be considered upon its merits.*"

Metcalf vs. Watertown, 128 U. S., 586.

II.

The plaintiff had no power to contract or to sue upon alleged contracts.

If there was no payment of the subscriptions for stock, then the plaintiff had no capacity to make any contract, and those alleged in the complaint are void, and cannot be enforced in any court.

"In Johnston *v.* Hines, 61 Md., 130, this court has said, speaking of the invalidity of a mortgagee's title derived from a trustee's deed made without ratification of the sale, but after ratification of an audit: 'There is marked and important distinction between nullities and irregularities. An irregularity may be waived; a nullity never can be waived.' In recognition of this fundamental principle, the exact question raised here was decided in the recent case of Jones *v.* Aspen Hardware Co., 21 Colo., 263; 29 L. R. A., 143. This was an action of replevin by the company to recover a stock of goods. The statute in that case provided that every corporation incorporated under any general or special law, should pay the State a fee, to be graded according to its capital stock, to be due and payable upon the filing of the certificate of incorporation, and that no such corporation should have or exercise any corporate powers until such fee should have been paid; and it was held that an association, having failed to comply with the statute with respect to the payment of the fee, was neither a *de jure* nor a *de facto* corporation, and was not competent to maintain a suit as such. The court said: 'The language of the act is plain and unambiguous. * * * The doctrine of estoppel cannot be successfully invoked, we think, unless the corporation has at least a *de facto* existence. * * * A *de facto* corporation can never be recognized in violation of a positive law. * * * There is a broad distinction between those acts made necessary by the statute as a prerequisite to the exercise of corporate powers and those acts required of individuals seeking incorporation, but not made prerequisite to the exercise of such powers.' These principles were clearly recognized and applied in Boyce *v.* Tow-

sontown Station of M. E. Church Trustees, 46 Md., 373, 374, where the court said: 'The statute law of the State expressly requiring certain prescribed acts to be done to constitute a corporation, to permit parties indirectly, or upon the principle of estoppel, virtually to create a corporation for any purpose, or to have acts so construed, would be in manifest opposition to the statute law and clearly against its policy, and justified upon no sound principle in the administration of justice."

Md. Tube & I. Wks. vs. West End Imp. Co. (Md.), 39 L. R. A., 810.

"Appellees did not act in good faith in procuring their act of incorporation, as is disclosed by their own evidence. In order that such corporate character be sustained, even if the parties had fully incorporated and organized as a corporate body, it is necessary that both the State creating the corporation and the corporation created shall have acted in good faith in conferring and taking the corporate privileges. These things, being matters of proof, must be shown by evidence, and it devolved upon appellees to show this. 'A corporation must have obtained its franchise in good faith, in order to preserve its corporate character in its contracts, and shield its members from personal liability on such contracts.' A corporation cannot incorporate in one State for the purpose of carrying on all of its corporate business in another. The stockholders would be held to be partners. Hill *v.* Beach, 12 N. J. Eq., 31; Cook, Stock and Stockholders, sec. 238; see also Land Grant R. & T. Co. *v.* Coffey County Com'rs, 6 Kan., 245; Morawetz, Priv. Corp., 1st ed., sec. 513; Erie R. Co. *v.* State, 31 N. J. L., 543, 544. That the Alston Grocery Company could, as a corporation, maintain suits, or could even have done so as such corporation, in this State while in business, would hardly be affirmed by any lawyer; but that it could have, as a firm of individuals or partners, maintained or defended such suits, could not be successfully denied. The authorities already cited amply and fully sustain these positions."

Empire Mills vs. A. G. Co., 12 L. R. A., 366.

The organization must be *bona fide*.

T. I. Dist. vs. Shepherd, 185 U. S., 13.

"These individuals, then, must be treated and dealt with by the law as partners trading under the name they have assumed. Although their object in taking the name they did was to avoid personal responsibility, the law will not allow them so to escape. A court of equity, as well as a court of law, will treat them as partners."

Hill vs. Beach, 12 N. J. Eq., 31.
Beach on Private Corporations, sec. 16, page 25, vol. 1, and cases cited in note.
Kaiser vs. L. S. Bank, 41 Am. Rep., 85.

"The plaintiff sues as the Aspen Hardware Company, and the facts alleged show that such company was a copartnership, and not a corporation. There is nothing in the name of the association to conflict with this as at common law partners may carry on business under any name they choose. They are bound rather by their acts than by the style which they give to themselves. Cook, Stock & Stockholders, sec. 233; Chaffe *v.* Ludeling, 27 La. Ann., 607. This principle has been applied in many cases where parties have set up the defense of individual non-liability by reason of having directed an incorporation to be had, but where none in fact was consummated. Cook, Stock & Stockholders, secs. 233, 234; Abbott *v.* Omaha Smelting & Ref. Co., *supra;* Empire Mills *v.* Alston Grocery Co. (Tex.), 12 L. R. A., 366. The law having cast this liability upon the members of the association, we think they must be given the advantages accorded a copartnership. So, in this case, while we feel compelled under the statute to deny plaintiff's right of recovery as a corporation, we think they may maintain the action as a copartnership. The cause will accordingly be reversed and remanded with directions to the district court to allow the parties to amend their pleadings as they may be advised."

Jones vs. Aspen Hardware Co., 29 L. R. A., 143.

"If an attempt to organize a corporation fails by omission of some substantial step or proceeding required by statute, its members or stockholders are liable as partners for its acts and contracts."

Bergeron vs. Hobbs, 96 Wisc., 641 (65 A. St. R., 85).

The Wells Company had no legal right to transact business, because the capital stock was not paid, as required by the statute.

Burns vs. Beck (Ga.), 10 S. E. Rep., 121.

The defendant is not estopped in this case by any dealing with the corporation, to deny that it had the power to contract or to sue upon its contract.

In Doyle vs. Mizner (Mich.), 3 N. W., 968, the court says:

"There are certainly many cases in which a recognition of corporate existence, by dealing with the corporation, will estop from questioning it. But this doctrine rests on the ground that such action creates relations and encourages conduct which there may be difficulty in undoing. In ordinary cases such recognitions have been considered as binding.

"But this rule is one originating in equitable principles and cannot be applied universally. There would be no sense in applying it where no new rights have intervened, and where such recognition has itself been brought about by fraudulent dealings carried on for the very purpose of entrapping a party into the action on which such recognition is rested. If there was no corporation in fact, and if there are no facts which make it legally unjust to forbid its denial, it is difficult to understand what room there is for an estoppel; and, inasmuch as facts were asserted by plaintiff tending to show good reasons why he should not be estopped, and that testimony was open to the jury, the rulings upon the proof of corporate existence are fairly open to review."

"Each of them knew what was done, and was bound in law to know there was no incorporation."

Ibid., p. 972.

In Welland Canal Co. vs. Hathaway, 25 Am. Dec. (N. Y.), 51, the court says:

"The plaintiffs held themselves out to the world as a corporate body, duly constituted to transact business in the

manner and under the circumstances detailed in the special verdict, and the defendant has contracted with and done labor for them under the supposition that these professions were correct. If they have not the powers and privileges assumed on their part in their dealings with him, it is their own fault, not his. Whether they had these powers must have been known to themselves, not to the defendant, and no act of his could legally add or detract from them. Why, then, should he be estopped from denying their corporate capacity, or they be excused from establishing it by legal evidence, when they are endeavoring to enforce their rights in a manner and before a tribunal which can entertain their suit only upon the proof or assumption that they are a corporate body, duly constituted by competent authority?"

* * *

"But it is said that the defendant, by his contracts with the company, has admitted that they are a body corporate, duly constituted by law. I cannot assent to this position. The evidence proves that he has contracted with the agent of an association denominating themselves the Welland Canal Company, and nothing more. Whether they were incorporated by competent authority, or if incorporated, what were the legal capacities, are not admitted by him. To justify the inference attempted to be drawn from the contract with the plaintiffs, it must first be shown that there cannot exist an association styling themselves the Welland Canal Company, unless such association be incorporated and possess the legal capacity to contract, and to prosecute suits in courts of justice; but if such association can exist without being incorporated, why infer more than appears upon the face of the contract? Suppose the defendant had brought an action against the agent of this company on a contract made with him, could the agent set up as a defense that by the terms of the contract the defendant had admitted that he not only acted as agent, but that he was duly constituted such agent? Certainly not. It is well settled that he must plead and prove his authority, so as to give a remedy against the company (19 Johns., 60; 13 *id.*, 307; 1 Cow., 536), and this must generally involve proof of the legal existence of the corporation. The contract on its face would show that he acted as agent, and show the nature and extent of his powers. So in this case, the receipt and contract show the fact of an association, acting under a particular name. So

much appears on the face of the contract, and may be said to be admitted, but that is not enough for plaintiffs; it must also appear that they had legal authority and capacity thus to act, and to prosecute suits by such name, before their suit can be entertained."

In Davis *vs.* Stevens, 104 Fed. Rep., 235, the court says:

"This section, as I understand it, simply declares the law in the same manner that the courts declare it. It pre-supposes that there is a *de facto* corporation, which cannot exist if there could have existed no *de jure* corporation. In the case of Oroville & V. R. Co. *v.* Supervisors of Plumas Co., 37 Cal., 354, it was held by the supreme court of California that a similar provision in the laws of that State did not go to the extent of precluding private persons from denying the existence *de jure* or *de facto* of the alleged corporation. In sec. 506, 1 Thomp., it is stated:

"'The simple and true view is that if men undertake to form themselves into a business company which the State cannot recognize as a corporation, or which is even forbidden by the State, and in that character contract debts which would be valid and enforcible if contracted by individuals, the courts of justice should hold them liable as partners. It is intolerable that A. B. & C., by merely assuming a corporate name and pretending to be a corporation, can incur with innocent members of the public obligations which would be valid if incurred by them individually, and then escape liability because the law forbids them to act as a corporation in the incurring of such obligations. A simple rule, and one which applies in all cases, is that, where the obligations of a pretended corporation are neither inequitable nor immoral, the judicial courts should enforce them against the corporations as partners. So to do would be strictly consonant with public policy, because, if business adventurers learn that, unless their corporate organization is lawful and valid, they are liable as partners, this will deter them from attempting to form illegal or prohibited corporations.'"

In Wechselberg *vs.* Flour City Nat. Bank, 64 Fed. Rep., 90, the court says:

"The statute must be considered in its entirety to ascertain its meaning, and that exposition ought to be adopted as

stated by Mr. Justice Story, in Minor *v.* Bank, 1 Pet., 46, 'which carries into effect the true intent and object of the legislature in the enactment.' The purpose is clear that corporate being shall be dated from and conferred through the act of filing the executed articles of incorporation for record as one of the conditions precedent; but, while the statute refers to it as a corporation at that stage, a limitation is added that it shall not exercise corporate functions, viz., 'the transaction of business with any others than its members,' until it shall have provided capital stock in conformity with section 1773. Such is the view recognized in Mining Co. *v.* Sherman, 74 Wisc., 226; 42 N. W., 226; where it is said that this statute 'provides for the preliminary organization of the corporation, and then limits its power to enter upon its general business,' by section 1773. The corporation has obtained the right to exist, but can only be said to have existed in a qualified sense, for it is not possessed of the attributes or privileges of perfected incorporation; and section 1775, which declares these powers and privileges, vests them only when organized as required by the preceding sections. A quotation from the brief of one of the learned counsel for the plaintiff in error (arguing against liability as a stockholder) well defines this embryonic status, and is adopted here. It reads (including italics) as follows: 'The truth is that no corporation was formed except in a very limited and qualified sense. It is true the statute uses the word 'corporation.' It is, however, a bare, legal entity, which through organization may become a corporation, having members, and capable of transacting business. * * * It may be likened to the hull of a ship, without rudder or masts or gearings.

"The public are authorized to treat it as a corporation from the recording of the articles, and may look to the recorded articles for its purposes and objects. Compliance with section 1773 is imposed upon the corporators in the first instance, and when they have provided for stockholders the duty devolves upon the latter, whose action is matter only of corporate record, and not of general public record. Until this provision of capital is furnished to take the place of personal liability, the intention is apparent to withhold the special privilege of complete incorporation which exempts the members from liability. The inhibition is, in effect, against any transactions except such as tend to organization, *i. e.*,

perfecting incorporation,—and the purpose is to protect those who may be imposed upon by premature assumption of corporate functions, and not to save the corporation or its projectors from just liability. Mining Co. *v.* Sherman, *supra*. This is not like the technical requirement placed by a Michigan statute upon the officers to file their articles of association in a certain place, simply forbidding business until compliance, without declaring effect for non-compliance—of which it was held in Whitney *v.* Wyman, 101 U. S., 392, that the provision was not made a condition precedent to incorporation; and it is not like the technical requirement found in the former Wisconsin statute that the officers should file a certificate of incorporation before transacting business, held in Harrod *v.* Hamer, *supra*, not a condition precedent; but the demand here is of the very essence of incorporation—that there shall be capital stock and stockholders. A corporation cannot come into existence without members, and stockholders are the only members of a stock corporation."

III.

The plaintiff below is bound by the contract made by W. L. Wells, and the defendant is entitled to a credit on the purchase-money by reason of the subscription to the stock.

A. The taking of the stock in part payment of the price of the cotton was not ultra vires.

(1.) *The taking of the stock by the defendant in part payment of the price was a mere incident of the transaction in regard to the sale of the cotton, and, therefore, was infra vires.*

This court says (Simonton, J.), in Insulated Wire Co. *vs.* Mayor, etc., 74 Fed. Rep., 363:

"Is the contract in question within the scope of the charter of the plaintiff? The rule laid down by the Supreme Court upon this subject is clear. In Green Bay & M. R. Co. *vs.* Union Steamboat Co., 107 U. S., 98; 2 Supt. Ct., 221, it is thus expressed:

"'The charter of a corporation, read in connection with the general laws applicable to it, is the measure of its powers, and a contract manifestly beyond these powers will not sustain an action against the corporation. But whatever, under the charter and other general laws, reasonably construed, may fairly be regarded as incidental to the objects for which the corporation is created, is not to be taken as prohibited.'"

The same rule is followed and illustrated in Ft. Worth City Co. *vs.* Smith Bridge Co., 151 U. S., 294; 14 Sup. Ct., 339. The same rule was recognized and applied in Navigation Co. *vs.* Hooper, 160 U. S., 524; 16 Sup. Ct., 379. The court quote with approval the language of Lord Selbourne, Ch., in Attorney General *vs.* Great Eastern Ry. Co., 5 App. Cas., 473:

"This doctrine (*ultra vires*) ought to be reasonably, and not unreasonably, understood and applied; and whatever may fairly regarded as incidental to or consequential upon those things which the legislature has authorized, ought not, unless expressly prohibited, to be held by judicial construction to be *ultra vires*."

The court also adopts and quotes the language of Bigelow, C. J., in Brown *vs.* Winnisimet Co., 11 Allen, 326:

"We know of no rule or principle by which an act creating a corporation for certain specific objects, or to carry on a particular trade or business, is to be strictly construed as prohibitory of all other dealings and transactions not coming within the exact scope of those designated. Undoubtedly the main business of a corporation is to be confined to that class of operations which properly appertain to the general purposes for which its charter was granted. But it may also enter into and engage in transactions which are incidental or auxiliary to its main business, which may become necessary, expedient or profitable in the care and management of the property which it is authorized to hold under the act by which it was created."

In Bancroft & Sons *vs.* Bloede, 106 Fed. Rep., 396 (at p. 399), this court says:

"But the purchase of stock by a corporation in other corporations, such purchase being incidental to its business, is

not unlawful. First National Bank *vs.* National Exchange Bank, 92 U. S., 122."

B. & L. Ass'n vs. Ebaugh, 185 U. S., 120.
Meares vs. Imp. Co., 126 N. C., 662.
Germania Nat. Bank vs. Case, 99 U. S., 628.

"The legality of the transaction could not have depended upon the intention of the corporation to wind up its affairs immediately. If it had taken the stock in payment for goods, or for the sale of a building or land or water power which it did not want or desired to sell, while it still carried on its business, the act must have been equally legal. We have no occasion to say how it would have been if the stock had been purchased for permanent investment. If such a question should arise, it would require much consideration. A great part of the business of the community is done by means of corporate organizations. It would be difficult for many of them to manage their business and collect their debts if they could not, at least temporarily, hold the stock of other corporations. Some of them, as savings banks, for example, are restrained by statute. But corporations established for manufacturing and trade are under no statute restrictions which can apply to a case like the present."

Howe vs. Boston Carpet Co., 16 Gray, 495, 496.

"It is well settled in this country that one corporation is prohibited from investing its property in the capital stock of another unless there is express power to do it, or unless there is something peculiar in the express powers from which it can be fairly implied. * * * This does not prevent a corporation from receiving the stock of another in payment of, or in security for debt in due course of business (Howe *v.* Carpet Co., 16 Gray, 493), but it prevents a deliberate and permanent investment of a corporation's assets in the stock of another."

Marbury vs. Kentucky U. L. Co., 62 Fed., 351, 352.

III.

A. The taking of the stock in part payment of the price of the cotton was not ultra vires.

2. *If the taking of the stock in part payment of the price of the cotton was not a mere incident of the sale by plaintiff to defendant, and therefore infra vires originally, the contract as between Wells Company and the defendant was fully executed, and the doctrine of ultra vires does not apply. The cotton had been sold and delivered and the money actually paid by defendant to the Loray mills for the stock.*

In Marbury *vs.* K. U. L. Co., the court says:

* * * "But it is claimed that the contracts having been executed, equity will not set them aside, even though they were *ultra vires.* * * * Moreover, the stock and lands received for the land had been pledged by the land company to secure debts of its own. It is therefore apparent that, not only have all the contracts for the exchange of land for stock been executed, but that third persons, not parties to the intervening petition of Marbury & Jones, have invested money on the faith of the grants of the land on the one side and of the land company's ownership of the stock on the other. * * * We are very clear that it would be inequitable to set aside the transactions here complained of in the absence of the third persons who have advanced money on the faith of their validity, and who have not been tendered the money advanced by them on the stock or invested by them in the lands sought to be recovered."

Marbury vs. Kentucky Union Land Co., 62 Fed., 351, 352.

"Admitting that the South & North Alabama Railroad Company had no authority under its charter to issue this stock, and that the Louisville & Nashville Railroad Company had no authority under its charter to purchase and hold it, still the charters of the respective companies did not forbid it, and the rule is, that contracts which, though in-

valid for want of corporate power, yet, if fully executed, they shall remain as the foundation of rights acquired by the transaction. * * * Thomas *v.* Railroad Co., 101 U. S., 82, in which it is said: 'The executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith require it.'"

Taylor vs. S. & N. Alabama R. Co., 13 Fed., 155.

"Another complete and perfect answer to the objection urged is that the defendants, having reaped the benefits arising from the contract, cannot, under the plea of *ultra vires*, seek to defraud the other parties. Even although it may have been made without express authority, the contract must be allowed to stand as the plainest rules of good faith demand. (Castle *v.* Lewis, 78 N. Y., 131.) The rule is well settled that the plea of *ultra vires*, should not, as a general rule, prevail, whether interposed for, or against a corporation, when it would not advance justice, but, on the contrary, would accomplish a legal wrong."

The Rider Life Raft Co. vs. Roach, 97 N. Y., 381.

"It is now very well settled that a corporation cannot avail itself of the defense of *ultra vires* when the contract has been, in good faith, fully performed by the other party and the corporation has had the full benefit of the performance and of the contract."

Whitney Arms Co. vs. Barlow, 63 N. Y., 70.

"The defendants claim that the sale made by the corporation was void for want of authority inasmuch as the statute in regard to manufacturing corporations requires that there shall not be less than three trustees and three stockholders, and as there are only two, the corporation could not pledge the property. * * * The corporation received the money loaned from the plaintiff's assignor, and gave title to the property in question for the purpose of securing the same. Although only two trustees acted in making the arrangement, this fact does not authorize the corporation to set up such a defense against the plaintiff's demand. Having received the benefit of the contract which has been executed, even although it may have been made without express authority, it must be allowed to stand, as the plainest rules of good faith demand."

Castle vs. Lewis, 78 N. Y., 134.

"The contract by which the St. Louis, Vandalia & Terre Haute Railroad Company conveyed its railroad and franchises to the Terre Haute & Indianapolis Railroad Company was void as beyond the latter's corporate powers; and both parties were *in pari delicto;* and the invalidity of the conveyance, in view of the laws of which both parties were bound to take notice, was apparent on its face; and it having been executed by both parties, the former has no right to invoke the assistance of a court of equity to set it aside; and so far as it can be considered as representing the stockholders and seeking to protect their interest, it and they are barred by laches in this case."

St. Louis, V. & T. H. R. Co. vs. Terre Haute & I. R. Co., 145 U. S., 393.

"Nor can the corporation defend itself against a claim for money, paid at its request to one who advanced the price of a steamboat purchased for it, on the ground that the purchase was *ultra vires;* although the plaintiff, when he paid the money, knew all the facts." (Head-note.) (From opinion.) "Contracts with corporations, made in excess of their powers, which are purely executory on both sides, and where no wrong will be done if the parties are left in their previous situation, I am willing to agree, should not be enforced, because such contracts contemplate an unauthorized diversion of corporate funds, and, therefore, a breach of private trust. But the executed dealings of corporations must be allowed to stand for and against both parties when the plainest rules of good faith so require."

Parish vs. Wheeler, 22 N. Y., 494, 508.

"It remains to consider the suggestion that the contract, having been executed, the doctrine of *ultra vires* is inapplicable to the case. There can be no question that, in many instances, where an invalid contract, which the party to it might have avoided or refused to perform, has been fully performed on both sides, whereby money has been paid or property changed hands, the courts have refused to sustain an action for the recovery of the property or the money so transferred.

"And in regard to corporations the rule has been well laid down by Comstock, Ch. J., in Parish *v.* Wheeler, 22 N. Y., 494, that the executed dealings of corporations must be

allowed to stand for and against both parties when the plainest rules of good faith require it."

Thomas vs. West Jersey R. R. Co., 101 U. S., 71.

In the case of Cincinnati H. & D. R. R. Co. *vs.* McKean, 64 Fed., 36, plaintiff sought to have canceled a contract made by one Ives, its vice-president, by authority of its stockholders and directors, with defendant, and to recover for money paid by said Ives to defendant for twenty thousand shares of stock in another railroad company, purchased for its use and benefit, upon the ground that said contract was *ultra vires*. Held by Harlan, J., that as the contract had been fully executed by the parties, plaintiff was not entitled to the relief demanded (citing Thomas *vs.* R. R., 101 U. S., 71, and other cases).

"Besides, the contract having been fully executed by the plaintiffs, the corporation cannot, while retaining the benefit of it, assert that it had no power to make a contract, the consideration of which it has received. State Board, etc., *v.* Railway, 47 Ind., 407, and cases cited; Chicago, etc., Co. *v.* Derkes, 103 Ind., 520; 3 N. E. Rep., 239. The rule requiring the observance of good faith and fair dealing is applicable to corporations as to individuals. Neither can involve others in onerous engagements, and with the consideration of the contract in their possession, disavow their acts to the damage and discomfiture of others, unless it clearly appears that there was an absolute want of capacity to make the contract."

Louisville, N. A. & C. Ry. Co. vs. Flannagan (Ind.), 14 N. E., 374.

"The Oil Creek & Allegheny River Railroad Co. agreed to pay the Pennsylvania Transportation Co., an oil pipe line, a certain sum per barrel on all oil transported by it in consideration that the pipe line would deliver all the oil under its control to the railroad company for transportation; the pipe line performed its part of the agreement and brought suit to recover the price agreed on. Held, that the railroad company could not set up as a defense that the contract was *ultra vires*." (Head-note.) * * * (From opinion.) "It

does not appear to have occurred to the defendants below that the contract of July 26, 1871, was *ultra vires* until it became apparent that by their subsequent modification of it they had made a bad bargain. * * * We do not think the defendants are in a position to defend upon the ground of the illegality of the contract. There are mutual covenants and mutual advantages. The defendants had enjoyed the advantages, such as they were. To the extent of the demand in this suit the contract was executed, and to say now that it was *ultra vires* comes with an exceedingly bad grace from the defendants."

Oil Creek & A. R. Co. vs. Penna. Trans. Co., 83 Pa. St., 160 and 166.

"The appellee sold to the appellant, and received and used the proceeds of the notes in its business. It continues to do so, and we hardly need cite authority in support of the chancellor's conclusion that the transaction was not void for want of authority on the part of the appellee's president to discount the paper. The corporation cannot hold on to the money, and repudiate the acts by which it got it."

German Nat. Bank vs. Louisville Butchers Hide & T. Co., 29 S. W. (Ky.), 884.

"Corporations are presumed to contract within their powers. The doctrine of *ultra vires*, when invoked for or against a corporation, should not prevail where it would defeat the ends of justice or work a legal wrong."

The Ohio & Miss. Ry. Co. vs. McCarthy, 96 U. S., 258.

"The law never sustains a defense of this nature out of regard for a defendant; it does so only where an imperative rule of public policy requires it. The instances are rare in which a corporation or individual has been permitted to set up its own wrong in order to retain both the property and its price. The defendant corporations have obtained the stock which they now allege they had no right to buy, and propose to retain it without payment. It would be difficult to imagine a defendant with less merit, and the law would be exceedingly impotent were it to allow it to succeed. * * * After the plaintiffs had made out their case the defendants set up their want of corporate power to buy the stock, by way of defense. This with the stock transferred

to them and unpaid for. The effect of this defense, if successful, would be to punish innocent parties who had no connection with the illegal transaction for the wrongful act of the defendant corporations.

"It may be that as between the original parties the defendants could have rescinded the contract and declined to receive the stock. But they executed it; they accepted the stock and gave their note in payment, for which note the plaintiffs paid value in good faith. The defense of *ultra vires* by a corporation comes with a better grace if made before it has discovered that it has made a bad bargain."

Wright vs. Pipe Line Co., 47 Am. Rep. (Pa.), 702 and 703.

"I agree with the counsel for the defendants that this company had no authority to purchase or deal in these bonds. But since the decision in Moss v. The Rossie Lead Mining Company, 5 Hill, 137, I do not see that a corporation can ever avoid its obligation on the ground that it was given for property which the corporation was not authorized to purchase. And if the company was bound, I see no reason why the defendants should not also be bound by the contract."

State of Indiana vs. Woram, 40 Am. Dec. (N. Y.), 380.

III.

B. *W. L. Wells had original authority to make the contract, including the stipulation as to the stock of the Loray mills.*

As W. L. Wells was, at the time of making the contract, the president and general manager of the Wells Co., he had necessarily full power to enter into the contract, and the plaintiffs were bound in all respects by his actions in that behalf.

"A corporation is liable on a contract made by its general manager within the scope of its business."

Clowe vs. Imp. P. P. Co., 114 N. C., 304.

In Sun P. & P. Ass'n *vs.* Moore, 183 U. S., 642, the court says:

"The managing editor of a newspaper, charged with the full control of the business of collecting news, and impliedly vested with power to enter into contracts in respect thereto, is, in effect, a general officer of the newspaper corporation as to such matters, and as such has power *prima facie* to do any act which the directors or trustees of the corporation can authorize or ratify."

In First Nat. Bank *vs.* V. V. G. & V. B. Min. Co., 89 Fed., 439, the court says:

"The authority which the public may presume is lodged with an officer of a corporation depends much upon the nature of the office and the character and general objects of the corporation. When an officer is given general authority to manage its business, and especially when he is one of its *chief officers*, his presumed authority is extended to include any act that can be necessary in the conduct of its business, or that can tend to the promotion of its objects. This presumption of authority is increased when such officer is managing the business at a place remote from the home or the chief office of the corporation. Any act by a corporate officer inuring to the advantage of the corporation, or the benefit of which it receives and appropriates without objection or disaffirmance, even when it may have been beyond the authority of the officer, binds it. Not only must a corporation, through its directors or managing board, within a reasonable time disaffirm any contract made by any of its officers beyond the limits of their authority, but it is so much the duty of such board to know what its officers do that ignorance thereof cannot be urged as a justification for failure to disaffirm. That like prior transactions have passed unchallenged justifies a presumption of authority in the officer making them. In consideration of the manner in which corporations are now largely organized and operated, strength is added to these presumptions. Probably the majority of those organized in recent years are for the purpose of operating some small mercantile, mining or other pursuit, in which a very few interested parties constitute the chief officers who manage the business; while a few parties,

often having little, if any interest in its affairs, constitute the managing board, and in law the corporation, but in fact are merely perfunctory officials, who, instead of managing, are managed. Such corporations should be dealt with as they deal with the public. The acts of their chief officers who manage the business, and are permitted to do so by their "decoy" directors, should be deemed the acts of the corporation. It would be monstrous to permit escape from responsibility in such cases by the pretense that such acts are *ultra vires*."

In McKenzie *vs.* Poorman Silver Mines of Colorado, 88 Fed., 112, the court says:

"In an action against a corporation on a contract made between plaintiff and a third person, who is alleged to have acted in behalf of the corporation, it is not necessary to show that the contract was made under authority of a resolution of the board of directors; and, if there is evidence tending to show that it was made in the interest of the corporation, which recognized it, accepted its benefits, and acted on its provisions, this is sufficient to warrant the submission of the cause to the jury."

In the case of G. V. B. Mining Co. *vs.* First Nat. Bank, 95 Fed., 27, the facts were that Bryan and Venable, owning certain mining property, incorporated the G. V. B. Mining Co., transferred the mining property to it in exchange for all its capital stock, a part of which they assigned to certain other parties in New York State for the purpose of organizing the company. Bryan was elected president, Howard secretary and Thurber treasurer of the company. Subsequently, in violation of the statute of New York State requiring the written assent of two-thirds of its stockholders, Bryan executed a mortgage on the company's property to secure debts due the bank for money used partly by the company and partly by Bryan and Venable individually, of which fact the bank had notice. Venable gave his written assent to this mortgage. At the time of its execution Bryan and Venable owned more than two-thirds of its capital stock

and had entire charge of its business. In upholding the validity of the mortgage the circuit court of appeals said:

* * * "We are of opinion that, at the outset, some distinction ought to be made between genuine, *bona fide* corporations, organized for the legitimate purpose of conducting a business which requires a combination of persons and of capital, to make the business successful, as distinguished from the character of a corporation organized and conducted, as this was, with a view to conduct and carry on the business in the same manner and way as if no corporation, in fact, had been formed. In the early history of the transactions, Bryan and Venable were in fact the corporation. They acted in the same manner—transacted business in the same way—as well after, as before, the corporation was formed. The court ought not overlook these peculiar facts and conditions. In endeavoring to sustain and uphold a law made for the protection of innocent stockholders, we should be careful not to announce a doctrine that would permit the leading stockholders, under the guise of a corporate name, to commit frauds by taking advantage of their own wrong. While Bryan and Venable were directors in name, they were also the principal stockholders in fact, and were merely using the corporate name for advantage and benefits which they might themselves derive therefrom. * * *

"In the light of the entire history of the corporation, as shown by the record in this case, it might be, perhaps, more properly said that Bryan, until January 11, 1895, by the consent of all parties interested and concerned, and H. K. Thurber thereafter, were to all intents and purposes the G. V. B. Mining Company; that, as was said by the circuit court, 'the so-called directors and officers in New York constituted simply the dumb machinery entirely directed by these parties, and through whom they operated when it was necessary to invoke the legal status of the corporation to strengthen their hands or advance their objects.' * * *

"In the consideration of the legal questions herein presented, it must constantly be borne in mind that we are confining ourselves to the peculiar facts established by the evidence as distinguished from the general principles applicable to the power of officers to bind the corporation. We are called upon to deal solely with exceptions to the general rule. In this view it becomes unnecessary to discuss the

various authorities cited by appellant's counsel as to the general manner in which corporations are legally authorized to transact their business. The vital question is whether, from the manner in which the G. V. B. Mining Company transacted its business, it can take advantage of its acts against the appellee. We are of opinion that, from the facts it cannot do so.

"Where the president of a corporation is given full power and authority to conduct and manage its business, and deal with the property and affairs of the corporation in such a manner, and for such a length of time, as to justify others with whom he transacts business in believing that he had authority to do the acts in the manner and way performed by him, the people with whom he transacts business have the right to deal with him upon the assumption that he has such authority; and the corporation, having knowledge of the exercise of such acts, and of the manner in which the corporate business was transacted, cannot thereafter, to the injury and prejudice of such parties, deny his authority or disaffirm or set aside his acts."

In the case of *Burton, receiver, vs. Burley, receiver*, 13 Fed., 811, the facts were that the City National Bank of Chicago was a regular correspondent of the First National Bank of La Crosse. It was the custom of the Chicago bank to transmit regularly copies of the account between the two banks to the La Crosse bank, and, if error was detected, the latter bank gave due notice thereof. One Sutor (formerly connected with the Chicago bank), moved to La Crosse and became president of the La Crosse bank, having obtained control of its affairs. Sutor owed the Chicago bank $7,000, evidenced by his note, and when he became president of the La Crosse bank, paid this amount from time to time by instructing the Chicago bank to charge different amounts to the La Crosse bank, to be credited upon his note. He also paid a note of one Minor (cashier of the Chicago bank), which he had assumed in the same way. All these transactions were duly entered upon the books of the Chicago bank and appeared upon the various statements sent by it to the

La Crosse bank. The La Crosse bank acknowledged the correctness of these statements, but failed to enter the transactions upon its books. Sutor was a man of small means and had, in fact, no authority to apply the funds of the La Crosse bank to the payment of his individual debts. In holding that the La Crosse bank was bound by the transaction, the court said:

"So that, in any view that I can take of this case, it seems to me that the plaintiff cannot maintain its action; that it must be concluded by the course of the business which has been done. *Non constat* but that, admitting all that is claimed on the part of the plaintiff, Mr. Sutor may have presumptively made some arrangement justifying his action with his own bank. The natural presumption that would arise in the minds of the officers of the city bank was that Mr. Sutor had made some transactions with the La Crosse bank by which he was authorized to act and by which the La Crosse bank had assumed the individual debt which Sutor owed to the City national bank. If the defendant insists the court must certify to the balance due from the La Crosse bank to the city bank, because I hold that these items of account which are the subject of controversy constitute a valid charge against the La Crosse national bank."

In the case of Armstrong, receiver, *vs.* Chemical Bank, 83 Fed. Rep., 556, the circuit court of appeals, by Taft, circuit judge, said:

"We think that for practical purposes Harper was the bank, and that the directors recognized him as such and that, included in such a delegation of authority as this condition of affairs implies, was the power to borrow money, if, as held in the Western Bank case, that power rests with the directors." * * * "In Martin *v.* Webb, 110 U. S., 428, the issue was whether a bank was bound by the act of its cashier in having canceled the obligation of its debtor secured by a first lien on his property in exchange for a partial payment on that and new obligations secured by a second lien." * * *

"Mr. Justice Harlan, delivering the opinion of the court, set out at some length the circumstances to show that, in fact,

the whole business of the bank had been delegated to the cashier by the directors, whose supervision over him was most perfunctory, and who were very little in the bank, and, that, if the directors did not abdicate all authority as such, they acquiesced in the cashier's assumption of exclusive management of the bank's business, and held that the directors and the bank could not be heard to deny the requisite authority in the case in hand."

See also:

Union G. M. Co. vs. Bank, 96 U. S., 640.
Sherman vs. Ficht, 98 Mass., 59–64.
White vs. Creamery Co., 74 N. W., 283.

III.

C. The contract was ratified by the subsequent dealings and correspondence between the parties, as shown by the oral evidence and exhibits.

(1.) *The plaintiffs received a benefit from the sale of the cotton, in the way of large profits, which they retain, and having thus ratified that part of the contract which favored them, they thereby ratified the whole.*

Where the principal seeks to enforce an unauthorized contract made by his agent, the benefits of which he received and retains, he thereby adopts and makes his own such contract, in its entirety, and will not be permitted to accept its benefits and reject its burdens.

In the case of Myra Clark Gaines *vs.* Miller, 111 U. S., 395 (28 Law Ed., 466), the facts were that Relf and Chew began to act as executors of the estate of Daniel Clark *in their own wrong* in the year 1811, and by power of attorney appointed Hammond their agent to sell certain lands in the State of Missouri, belonging to said estate. Hammond sold, collected the purchase-money and absconded without ever having

accounted therefor to his principals, who subsequently obtained judgment against him for the money so received as their agent. After more than twenty years' litigation the last will and testament of Daniel Clark was admitted to probate in 1856 and the plaintiff, the executrix, named therein, duly qualified as such. In 1879 letters of administration were granted to Miller upon the estate of Hammond, in the State of Missouri. This action was brought to recover from Hammond's estate the amount of the purchase-money received by him from the sale of the Daniel Clark land as the agent of Relf and Chew, the wrongful executors of the said estate. In denying the right of the plaintiff to recover, the court said:

"The second ground of demurrer is also well taken. The appellant by ratifying the sale made by Relf and Chew, through their agent, Hammond, ratified the acts of Relf and Chew in respect to the purchase-money received by Hammond. If Hammond, as their agent, had paid over to them the money received from the sales made by him, the appellant could not, having ratified the sale, repudiate the payment. If a principal ratifies that which favors him, he ratifies the whole. (Citing authorities.) By ratifying the sale, the appellant places herself in the position of Relf and Chew, and Hammond has the same rights against her as he had against them."

Same court said in another case:

"The position of counsel that the ratification, if sustained, only extended to the conversion of the bonds, and merely operated to deprive the transaction of its tortious aspect, all else consisting of dealings by Homans with his own property is not tenable. The answer to it is, that the ratification was of the whole transaction taken together; that of the appropriation of the bonds upon substituting an equivalent in value for them, not of a part without the rest, not of the appropriation without the substitution."

Cook vs. Tullis, 18 Wall., 332 (21 Law Ed., 937).

"It seems to us very clear that if the plaintiff's property was sold by a person assuming to act for him, but without

authority, in an action against the purchaser, if the plaintiff waives the tort, and ratifies the contract, he must ratify it as the agent has made it. Otherwise he can only sue for the property itself, or in tort, for damages for the unlawful conversion. He cannot ratify a part of the contract made on his behalf, and repudiate the rest."

Brigham vs. Palmer, 3d Allen (Mass.), p. 453.

"*A person cannot ratify that part of a contract* made for him by an unauthorized agent which makes for his interest and renounce that which makes against it.

"*Keeping part of the goods left for a person with an unauthorized agent*, who assumed to accept them in discharge of a contract obligation, which the other party had the option to discharge either in goods or in money, ratifies the act of the agent in accepting the goods, and prevents any rejection of other portions of the goods."

Daniels vs. Brodie (Ark.), 11 L. R. A., p. 81.
P. & C. R. R. Co. vs. Keokuk Bridge Co., 131 U. S., 371.
Clark vs. Reeder, 158 U. S., 505.
Owens vs. B. L. Co., 28 S. E. Rep., 950.
Wheeler & Wilson vs. Auchy, 22 Atl. Rep., 667.
4 *Thompson on Corp.*, sect. 5303.
5 *Thompson on Corp.*, sect. 6016–17–18.

III.

C. The contract was ratified by the subsequent dealings and correspondence between the parties, as shown by the oral evidence and exhibits.

(2.) *The plaintiff had notice of the terms of the contract between defendant and its agent, W. L. Wells, and did not repudiate the same, but acquiesced therein by its silence.*

The plaintiff, Wells Company, had notice of the terms of the contract under which the cotton was sold, when their letter to John F. Love, treasurer, dated August 31, 1900, was returned to them. This letter was sent by W. L. Wells

Company to John F. Love, treasurer of defendant, and in it a demand for the payment of $12,691.37 by the defendant to them was made. (See Exhibit D, page 59 of Record.) This letter was returned by John F. Love to the Wells Company, with a credit of "$10,000.00 for Loray stock" entered upon it and deducted from the amount claimed by Wells Company in that letter. This was quite sufficient to give Wells Company notice that defendant was claiming a credit for that amount ($10,000.00) on account of the stock of the Loray mills. If the Wells Company did not understand what this entry of a credit of $10,000.00 meant, they should have inquired, and the law presumes that they did so, as it was their duty to do so, and that they acquired all the information and knowledge which that inquiry, if duly prosecuted, would have disclosed; and, from their failure to reject or repudiate the contract for many months after that letter was received, if they were unwilling to be bound by it, the law conclusively infers their acquiescence and assent to the contract, and they will not now be heard to say that they are not bound by all of the terms thereof.

Bement vs. Armstrong (Tenn.), 39 S. W., 899.
Union G. M. Co. vs. Bank, 96 U. S., 640.
Field vs. Farrington, 10 Wall., 141.

The defendants below contend that the admitted facts show that John F. Love *gave the Wells Company notice in August, 1900, that $10,000*, due by said defendants to that company for cotton sold for the season of 1899–1900, *had been applied to the payment of the Loray stock;* that John T. Wells *admitted* that he received this notice (Exhibit D), and that *from that time* until *August 12th, 1901*, neither he nor any other officer of the company *ever made any demand* upon the defendants below for this amount, or said anything to W. L. Wells concerning it; that subsequently, on Dec. 3d, 1900, defendants settled for all cotton shipped them, up to that time, for the season, 1900–1901, invoices of

which were marked paid by the Wells Company, *and no mention was made of the $10,000 item;* that from Dec. 18th, 1900, to Jan. 31st, 1901, the Wells Company made *three several demands* upon the defendants for *payments* on account of cotton shipped during the months of Nov. and Dec., 1900, *being so urgent in said demands that W. L. Wells individually wired John F. Love on the 31st of January, 1901,* for a remittance (see letters Dec. 18th, p. 134, Jan. 2d, p. 137, and telegram Jan. 31st, p. 138); that *John F. Love wrote W. L. Wells on Feb. 2d, 1901, two days after the receipt of said telegram, that he had applied $50,000 of the amount, due by said defendants to the Wells Company for cotton, to the subscription for the Loray stock,* and *requested Wells to have his house* (the Wells Co.) *credit the defendants' account with that amount* (Exhibit T); that at this time, according to the *present* contention of the Wells Company, the defendants owed that company something like $65,000.00; that *after* the receipt of the letter of February 2d, *neither W. L. Wells nor any other member of the Wells Company ever made any demand upon the defendants for this large sum of money, until August 12th, 1901* (*p. 57*), *after the reorganization of the Loray mills;* that from Feb. 2d to August 12th, 1901, the Wells Company sold said defendants large quantities of cotton, for cash or acceptances, about which said parties had *frequent correspondence,* in which *no mention* was ever made of this large balance, which said defendants certainly owed the Wells Company, unless said $50,000.00 had been properly applied to the payment for the Loray stock; that during the season of 1899–1900 the Wells Company regularly rendered the defendants monthly statements, showing the balance due the former by the latter at the end of each month, and frequently demanded payment of such balances, but *failed to render any such statements from Feb. 2d to Aug. 12th, 1901;* that during the season of 1900–1901, the Wells Company, *upon W. L. Wells' individual credit, owed its bank upon an average of*

$128,000.00, money borrowed with which to carry on its business (pp. 29, 30 and 37).

The defendants below contend that these undisputed facts more than warrant the following conclusions: (1) *That the Wells Company had notice in August, 1900, that Love had paid $10,000.00* (the balance then due on the cotton transactions for that season) *on the stock subscription to the Loray mills:* (2) that the Wells Company by its failure to repudiate said transaction for twelve months is thereby conclusively presumed to have ratified the same: (3) *that the individual letter written by Love to W. L. Wells on Feb. 2d, 1901, in which he notified Wells that he had applied $50,000.00 to the payment for the Loray stock, and requested him to have the Wells Company credit defendants' account with said amount, was constructive notice to the Wells Company of that transaction,* it being *written about the business of said company* and, in effect, in reply to Wells' telegram of Jan. 31st: (4) *that the failure of any officers of the Wells Company to make demand upon defendants for this large sum of money for six months was at least strong evidence that said company had actual notice of the application of the same by John F. Love to the payment for the Loray stock and that it assented to such payment:* (5) that considering the *manner* in which the parties conducted all prior dealing between themselves, and *particularly* the *fact that theretofore the Wells Company had rendered regular monthly statements to said defendants and frequently and persistently demanded payments of the balances thus shown to be due,* THE DEAD SILENCE OF THE WELLS COMPANY FROM FEB. 2D TO AUG. 12TH, 1901, concerning the non-payment of this large amount of money, *when it owed its own bank something like $128,000.00, is utterly inconsistent* with the plaintiffs' *present* contention that *it had no notice that $50,000.00 of said indebtedness had been applied by Love in payment for the Loray stock.*

(1–2.) "Exhibit D" was a letter addressed by the Wells Company to John F. Love, treasurer, dated Aug. 31st, 1900

and recited the enclosure of an account showing a balance of $12,691.67 due the Wells Company by said defendants and asked for remittance by return mail. On the bottom of this letter was endorsed by John F. Love the following:

"$10,000.00 stock Loray mills.
" 2,691.67 interest.

"$12,691.67 balance.

"We want to see your Mr. W. L. Wells about it when he comes to see us."

John T. Wells admitted receiving this letter and filing it among the papers of the company (p. 22) and also that from the date of its receipt until Aug. 12th, 1901, neither he nor any other member of his company rendered defendants below a statement of, or made demand for, this money, or even mentioned the matter to W. L. Wells (p. 23). These facts we submit conclusively fix the Wells Company with notice that, by some arrangement between W. L. Wells and John F. Love, $10,000.00 of its money had been applied in payment for that amount of stock in the Loray mills, subscribed for by W. L. Wells, either for the company or for himself individually. With this *notice* the *silence* of the Wells Company for *twelve months* was a *complete ratification* of the arrangement between W. L. Wells and John F. Love, by which the Loray Mills stock was subscribed, and paid for out of the funds of the Wells Company.

To have avoided this legal result, the Wells Company, upon receipt of this notice, should have promptly notified Love that it would not consent to his application of this $10,000.00 in payment for said stock. For this position we quote from the following authorities:

In the case of Field *vs.* Farrington *et al.*, 10 Wal., 140 (19 Law. Ed., 923), the facts were that Field consigned certain cotton to Farrington, upon which money was advanced, and on October 28, 1865, he instructed Farrington to sell the

cotton. This the agent failed to do and on November 16th wrote Field informing him that he had not sold the cotton, the price of which had declined in the meantime.

Field purposely failed to answer this letter or to give his agent any further instruction. The cotton was subsequently sold and failed to bring enough to reimburse the agent for the moneys advanced. This action was brought against Field to recover the balance due on account of said advancements, and a counter-claim was set up by Field for the difference between what the cotton actually brought, and what it would have brought if it had been sold by the agent when directed by Field. In passing upon this question the court said:

"The effect of his refusal to reply to their letter within a reasonable time after he received it was, undoubtedly, to raise a presumption that he approved of what his factors had done, so far as their letter informed him. In the absence of anything to rebut that presumption, he must be regarded as having consented to whatever delay had occurred in effecting a sale, even though it was contrary to his directions. He could not, therefore, hold his factors responsible for the consequences of acts which he had ratified. * * * And in Story, Ag., sec. 259, it is said that: 'In the ordinary course of business between merchants and their correspondents, it is understood to be the duty of one party receiving a letter from the other to answer the same within a reasonable time; and if he does not, it is presumed he admits the propriety of the acts of his correspondence, and confirms and adopts them.'"

And in another case involving this question, the court said:

"This matter was reported to the directors. They had a meeting upon the subject some six weeks after the whole thing had been consummated and after they had received the benefits of the release by the payment of their drafts. The rule of law upon the subject of the disaffirmance or ratification of the acts of an agent requires that if they had a right to disaffirm it they should do it promptly, and, if after

a reasonable time they did not disaffirm it, a ratification would be presumed. In regard to this it appears that the board, when notified of what had been done by their agents, did not disaffirm their action at that time, but that the act or resolution of disaffirmance was passed about two years after notice of the transaction, and that if the suit brought in this case can be considered as an act of disaffirmance it came too late, as it was commenced some six months after they had knowledge of the release."

Ind. Rolling Mills vs. R. R. Co., 120 U. S., 256 (30 Law Ed.), 639.

"Where the agent acting for the best interest of his distant principal as he supposed, under the circumstances, had nevertheless gone beyond the letter of his instructions, if the principal did not choose to affirm the act, it was his duty when informed of the agent's act to give immediate information of his repudiation.

"He cannot by holding his peace and apparent acquiescence, have the benefit of the contract if it should afterwards turn out to be profitable, and retain a right to repudiate it, if otherwise."

Law vs. Cross, 66 U. S., p. 533 (17 Law. Ed., 185).
Bemit vs. Armstrong (Tenn.), 39 S. W., 899.
Goddard *vs.* Foster, 17 Wallace, 123. Duty of court to construe letter and correspondence.

(3.) Was the individual letter (Exhibit T) written by Love to W. L. Wells on February 2, 1901, notice to the Wells Company? It was, in fact, a reply to the telegram of W. L. Wells of January 31st, demanding remittance for cotton sold and unequivocally stated that "I have paid in your $50,000.00 stock and can send you certificates any time in any way you suggest, and before issuing them will await your advice. Please have our account with your house credited with this amount."

This was certainly notice to W. L. Wells, *who entered no word of protest*, or objection, to this application of $50,000 of his company's money, his only reply being a telegram of February 4th (p. 139) asking when Love expected "to or-

ganize and elect officers for the Loray." *Wells was then president, and owned one-half of the capital of his company, and furnished all the credit upon which it did business*, being, at that time, *endorser for it for something like* $128,000 *in his bank.* He *was rich*, the *other two members of his company having no financial rating whatever.* Then, why should it be *presumed* that he *withheld* this knowledge from his company? What had he to gain by doing so?

Conceding for the present, that he subscribed for this stock, in his own name, for his individual benefit, and applied his company's funds in payment therefor, *was this transaction such an one as he would naturally desire to conceal from the other members of his company?* If it was not, then, in law, notice to him was notice to his company.

But *he* makes answer to this contention by asserting that on October 4, 1900, he wrote a personal letter (Exhibit S) to Love in which he stated that "I am going to make a change in my present firm after this season, so don't want my arrangements with you and the Loray known to them. Hence in writing me about this, please mark your letters "Personal." In the same letter he also distinctly stated that he would take the $50,000.00 stock, "but want you, as stated when there, to let this come in on the last payments, say about January next."

Love says (pp. 95–96) that when W. L. Wells was at Gastonia in the latter part of September, 1900, he stated that if he subscribed for the $50,000.00 stock he expected it to be paid for out of whatever amounts the defendants might owe the Wells Company for cotton shipped, on or about "January next."

Conceding this to be true, this letter must be construed in the light of *this* evidence, the effect of which is, that Wells requested that the $50,000 stock subscribed for by him should be paid for out of whatever sum the defendants might owe the Wells Company January 1, 1901, for cotton.

Love says (pp. 70–71) that he understood Wells' letter to mean that *he did not wish the other members of his firm to know anything about the arrangement between him and Love, by which he was to move to Gastonia and become the purchasing agent of the Loray mills.* That he did not understand that Wells in that letter enjoined silence on his part *with reference to his stock subscription* in the Loray and the agreement to *pay for same out of funds of the Wells Company,* is conclusively shown by the fact that Love, in his letter of February 2d, requested Wells *to have his house credit the defendants' account with the* $50,000.00 *paid for the Loray stock.* If Love had understood that Wells desired to *conceal* from the Wells Company the *fact that he had subscribed for the Loray stock,* and that it was to be *paid for out of the funds of his company,* he *certainly would not* have made a request of Wells, *which he knew, if carried out, would disclose the very transaction* which Wells now claims was to be kept secret from his company.

We therefore contend that the agreement between these parties was not that the fact of the stock subscription by W. L. Wells, and the manner of its payment should be withheld from his company, but simply the fact that he contemplated moving to Gastonia and becoming the purchasing agent for the Loray mill.

If we are correct in this contention, then the letter of February 2d, from Love to Wells was notice to the Wells Company, in view of the fact that W. L. Wells could not possibly have had any *motive* in withholding the information therein contained from his own company. The peculiar facts of this case make it an exception to the general rule. *Wells was the company and the company was Wells. The interests of the two were identical.* If it be said that it was to his interest to conceal from the other two *nominal stockholders* the fact that he had appropriated $50,000.00 of the company's money, the answer is that at that very time he had, in effect, loaned the company $128,000.00, and it would have been a mere

matter of book-keeping to have adjusted the accounts between them. Where the reason for the rule does not exist, the rule itself cannot be invoked.

Anderson vs. Kinley (Iowa), 58 N. W., 910.

But, conceding that it was *originally* agreed that the *whole transaction* should be withheld from the Wells Company, yet it is perfectly apparent that *when Love wrote the letter of February* 2, 1901, he understood that the *time had come when there could no longer be secrecy about this matter;* for his request that Wells should have his company credit the defendants *with the* $50,000 *paid for the Loray stock*, was *totally inconsistent* with the idea that the *fact* of such stock subscription by W. L. Wells, and the manner of its payment *could longer be concealed from the company.* And, if W. L. Wells *failed* to comply with this request it was *his fraud* upon *his own company*, and not any fraud or misconduct on the part of Love, and *his company*, and *not* the *defendants*, should be held responsible therefor.

In support of this position we quote from the case of Anderson *vs.* Kinley, *supra*, where the court says:

"It is not practicable to set out the evidence which shows them, but it is sufficient to say that there does not seem to have been any very clear distinction between the affairs of Wilson and those of the company. Business seems to have been done in the name of either one, as suited his conveniences and purposes. No satisfactory account of the organization and business of the company is given, but Wilson appears to have owned and controlled a large part of the capital stock, if there was any, and he managed its affairs during the time in question largely according to his own inclinations, and to advance his own interests; and we think that the company was properly held chargeable with the knowledge of the conveyance in question which he possessed."

(4–5.) Why did the Wells Company, contrary to its uniform custom in dealing with the defendants below, fail for

twelve months, in the first instance, and six in the second, to make demand for this large sum of money, which it claims was all this time justly due it?

Why did all communications cease concerning these amounts after John Love wrote the endorsement on Exhibit D in August, 1900, and his letter of February 2, 1901, advising plaintiff that said amounts had been applied in payment for the Loray stock? Can this strange conduct of the Wells Company be explained upon any *reasonable theory other than that its officers had notice of the fact that Love had so applied this money?* Can a reasonable mind, in the light of all this evidence, reach any other conclusion? It is true John Wells stated in his evidence that during this time he frequently spoke to W. L. Wells about the non-payment of this large sum of money, and that the latter would reply, "They are hard up," but gave no other reason for this unusual indulgence. The correspondence shows that such an excuse never availed the defendants in their prior dealings with the Wells Company, and as a matter of business judgment the alleged financial embarrassment of the debtors should have furnished the *strongest motives to the officers of the Wells Company* for prompt action in collecting so large a claim—more than five times the amount of its entire capital stock.

We therefore contend that *if this question had been submitted to a jury it must have* reached the irresistible conclusion, despite the direct evidence of John Wells, to the contrary, that his company had *actual* notice of the payment of this money on the Loray stock. But passing by this question, and assuming that the officers of the Wells Company, other than W. L. Wells, had no *actual* notice of the application of this $50,000.00 to the payment for the Loray stock and also waiving the fact that the *Wells Company in this action, through W. L. Wells, its principal stockholder and president, is now seeking to take advantage of this alleged fraud perpetrated by him upon his company,* in withholding

this important information from the other stockholders, can officers of a corporation charged with the management of its affairs, thus *close their eyes* to their manifest duty, by *negligently failing to investigate such suspicious conduct on the part of their president*, and then come into court and be heard to say that they *did not have notice of facts*, which, *by due and proper inquiry, on their part, would have been disclosed?*

We submit, upon what we think is the highest authority, that they cannot. In the case of Martin *vs.* Webb, 110 U. S., p. 7, the court, in discussing this subject, says:

"Directors cannot, in justice to those who deal with the bank, *shut their eyes to what is going on around them.* It is their duty to use ordinary diligence in ascertaining the condition of its business and to exercise reasonable control and supervision over its officers. They have something more to do than from time to time to elect officers of the bank and to make declarations of dividends. *That which they ought, by proper diligence, to have known* as to the general course of business in the bank, *they may be presumed to have known* in any contest between corporations, and those who are justified by the circumstances in dealing with its officers upon the basis of that course of business." (Italics ours.)

And again in the case of Armstrong *vs.* The Chemical Bank, 83 Fed., p. 573, the circuit court of appeals, by Taft, J., said:

"The general rule as to ratification is, as we conceive it, that a failure to repudiate the unauthorized act of an agent can never work a ratification of the act, unless the principal either has actual knowledge, *or by the exercise of due diligence would have had actual knowledge of the act. Now due diligence presupposes an affirmative duty owing from the principal to the other party to advise himself of the fact.*" (Italics ours.) * * *

"But where there is an existing relation between the principal and the other party, imposing on the former a *duty of knowledge* in respect to a class of facts which embraces the *unauthorized act*, then a *neglect* by the principal to *discharge the duty* and *inform* himself will have the *same effect as actual knowl-*

edge upon the issue of his ratification of the unauthorized act by estoppel. (Italics ours.) * * * The affirmative duty was thereby imposed upon the Fidelity bank to inform itself of the correctness of the items therein charged, and to object to the same if unwarranted or erroneous. *Negligence* in doing so was a failure of duty towards the Chemical bank and was the *equivalent of actual knowledge of those things which proper inquiry would have developed.* * * * The directors cannot rid themselves of *such notice by saying that their agents failed to communicate the facts to them.* * * * Now it might be that, if the agent who committed the fraud originally was the only person to make the examination, his failure to report it could be considered so much a part of this scheme to defraud, that notice to him would not be notice to the bank. But here no such difficulty arises. [It appearing that the other directors and officers of the bank might have discovered the facts constituting the fraudulent appropriation of the bank's funds by its agent.] * * * *In any event* we cannot presume that *such a discrepancy* would have been suppressed *if the president, who was certainly not privy to the fraud, had been exercising any care.*" (Italics ours.)

See also *Leather Manufacturers' Bank vs. Morgan*, 117 U. S., 96.

In the case of Kissam *et al.*, *vs.* Anderson, 145 U. S., 434, (36 Law. Ed., 765). the facts were that one Warner was first cashier and then president of the Albion bank, nearly all of the stock in which was owned by the estate of R. S. Borrows, of which Warner was executor. Including Warner, there were six directors of this bank which had a capital of two hundred thousand dollars. Warner dealt largely in stocks and other securities with Kissam, W. & Co., (plaintiffs in error), and during the course of these dealings between May 11, 1880, and August 26, 1881, as cashier or president of his bank, drew twelve different checks aggregating $103,000.00, upon the Third National Bank of New York, in favor of Kissam, W. & Co., for his own private account. During the said time Kissam, W. & Co. from time to time deposited to the credit of the Albion bank with the Third national bank sums aggregating $63,000.00.

The Third national in its regular monthly statements to the Albion bank, showed that these items had been paid for its account by Kissam, W. & Co., but most of *these statements were received by Warner and were never shown to any of the other officers of the bank.* In the meantime Warner drew from the Third national bank all the moneys so paid by Kissam, W. & Co. and misappropriated the same in his individual speculations. The receiver of the Albion bank contended that as Kissam, W. & Co. had *knowingly* received the funds of that bank and applied the same to the *individual indebtedness of Warner*, they were liable to said receiver therefor. Kissam, W. & Co. contended that they were not liable for the amounts they had *redeposited to the bank's credit* in the Third national. In holding with Kissam, W. & Co., the court, discussing the question of *notice* to the Albion bank of these transactions, said:

"If it be said that *no officer* of the Albion bank *knew* of these deposits *except Warner, the wrong-doer*, and that he subsequently drew out most of these moneys in drafts to further other wrongs, the *reply* is that the *other officers and directors* of the Albion bank were *chargeable with knowledge of these deposits.* If, through their *negligence*, they did not *in fact know*, that is a matter for which the *Albion bank* and *not the defendants*, were responsible. Kissam, Whitney & Co. had no *supervision over its affairs, no knowledge as to how those affairs were managed.* They were not called upon to *go to Albion and hunt up the various officers and directors, and inform them, one by one, personally*, that these moneys had been deposited to their credit in the Third national bank. It was enough that they deposited them, and that that bank, in the regular course of business, by monthly statements, informed the Albion bank that it received and held those moneys." (Italics ours.)

See also: *Sun Print. & Pub. Co. vs. Moore*, 183 U. S., p. 642.

III.

D. The plaintiff below ratified the contract by bringing this action for the purchase price, as fixed by the contract, and also by continuing to maintain and prosecute this suit, with knowledge of the terms of the contract in regard to the stock.

Plaintiff, having sued for the contract price of the cotton, has thereby ratified the contract irrevocably, and can recover only in accordance with its terms.

Assuimng, for the sake of argument, that the plaintiff was not bound by the contract of W. L. Wells to take the shares of stock in the Loray mills in part payment of the purchase price of the cotton, either one of two courses was open to the plaintiff:

It could either have repudiated the contract altogether, when informed of its terms, or it could have ratified it.

Ratification could be made in this case in either one of the two ways:

1. By recognition of the contract as a whole, as shown by receiving and retaining benefits under it, or by silence and acquiescence after notice of its terms. This has already been considered.

2. By recognition of the contract, as shown by suing for the purchase price or any part thereof, or, in other words, by electing to sue on the contract and not merely for the value of the cotton.

If the plaintiff intended to repudiate the contract, the suit should have been brought in trover for the value of the cotton, but the plaintiff, having elected to sue for the price of the cotton or the balance of the price alleged to be due, it thereby ratified the contract of sale as much so as if it had

expressly and fully accepted its terms and recognized it as binding in all respects.

Or, to state the proposition somewhat differently:

The plaintiff having sued upon the express or special contract for the purchase price of the cotton, is bound by that contract and every part thereof, and cannot recover on a part and repudiate the other part. It must recover only in strict accordance with the very terms of the contract, and will not be allowed to recover for the value of the cotton, as upon an implied promise to pay for the same, or in trover for the commission.

The suit having been brought upon the special contract for the price fixed by it or a part of such price, the plaintiff below, W. L. Wells Company, thereby ratified the contract and is as much bound by its terms as if it had originally given express authority to make it, and in this view, it can make no difference what the terms of the contract were.

An apt and striking illustration of this doctrine of ratification by bringing suit is found in the case of GAINES vs. MILLER.

In that case, it appeared that Daniel Clark executed a will in 1811, and, in July, 1813, he executed another will, which revoked his former will, and, in August, 1813, Richard Relf and Beverly Chew wrongfully assumed to act as executors of his estate, under the will of 1811, and, by power of attorney, appointed one Hammond to sell certain land of Daniel Clark in the State of Missouri. Hammond sold the land in 1819, for $6,841.80, and, failing to account for the proceeds, Relf and Chew sued him and recovered judgment for that amount in August, 1819. In October, 1823, an execution issued on this judgment and was levied on land belonging to Hammond, which was sold thereunder for $427.77, and this amount was credited on judgment. Mrs. Myra Clark Gaines, discovering afterwards, that she was the child of Daniel Clark and the general devisee and legatee under his will of 1813, caused the same, after long

litigation, to be admitted to probate in 1856. Hammond having died in the meantime, plaintiff, Mrs. Gaines, sued his administrator in equity to recover the proceeds of the sale of the land ($6,841.80) which were received by Hammond in 1819, acknowledging the transaction between him and Relf and Chew, as executors *de son tort*, and Hammond. Defendant demurred to the bill.

The Supreme Court of the United States held that, as plaintiff had brought a suit against Hammond's administrator for the proceeds of the sale of land, she thereby ratified all that had taken place between Relf and Chew, as executors *de son tort*, and Hammond, as attorney, in the proceedings against him to recover the proceeds of the sale of the land. The court further held that, because of this ratification, growing out of the suit for the proceeds of the sale, the plaintiff could not recover the said proceeds, as the cause of the action for the same had been merged in the judgment recovered by Relf & Chew *vs.* Hammond, and the judgment could be enforced only by execution or other final process or being a new *causa litis* by a suit thereon, and that no suit or action could be maintained for the proceeds, and that, as the judgment of Relf and Chew against Hammond, by the law of Missouri, was conclusively presumed to have been paid, on account of the lapse of time, the plaintiff's right to recover, even upon that, had been lost. The demurrer was sustained and her bill dismissed.

Gaines vs. Miller, 111 U. S., 395.

The case of Gaines *vs.* Miller, we submit, is direct authority in our case, for the position that plaintiff, Wells Company, has ratified the contract of W. L. Wells with the defendants by suing for the purchase price of the cotton, one of the consequences of such ratification being that the plaintiff cannot repudiate anything that was done by W. L. Wells, but must abide by his acts, and can recover only in accordance with the contracts as made by him.

In the case of Robb *vs.* Voss, 155 U. S., 13, the court discussed this question at length, and, in the course of the opinion delivered by Justice Shiras, used the following language:

"The defense of waiver arises where the remedies are inconsistent; as where one action is founded on an affirmance and the other upon the disaffirmance of a voidable contract of sale of property. In such case, any decisive act of affirmance or disaffirmance, if done with knowledge of the facts, determines the legal rights of the parties, once for all. The institution of a suit is such a decisive act; and if its maintenance necessarily involves an election, to affirm or disaffirm a voidable contract or sale, or to rescind one, it is generally held to be a conclusive waiver of inconsistent rights, and thus to defeat any action subsequently brought thereon."

"The rule established by these cases is that any decisive act by a party, with knowledge of his rights and of the facts, determines his election in the case of inconsistent remedies, and that one of the most unequivocal methods of showing ratification of an agent's act is the bringing of an action based upon such an act."

In our case, the plaintiff has not only sued for the price fixed by the special contract and thereby recognized and ratified the latter, but, since the defense of payment was pleaded in the answer and after a full disclosure of the facts by the defendant, the plaintiff has persisted in suing upon the special contract for the price of the cotton and has actually recovered judgment for the same, which it is now seeking to maintain and enforce. A more unequivocal and emphatic act of ratification could not be imagined.

See, also, the following cases:

Singleton vs. Bank, 38 S. E. Rep., 947.

Johnston vs. Imp. Co., 68 N. W. Rep., 383.

"Where an agent sells the goods of his principal at an agreed price, to be paid for in services to be rendered to the agent by the purchaser, and the principal, with the full knowledge of the facts, sues the purchaser in assumpsit for

the price agreed, he thereby affirms the contract of his agent, both as to the sale and the mode of paying the price. In such case the principal might repudiate the entire contract and recover the goods in an action of replevin or their value in an action of trover, but he cannot adopt the contract in part without adopting it wholly."

Shoninger vs. Peabody, 14 Am. St. Rep., 88.

It will be seen in paragraph 2 of the complaint, pages 3 and 4, of the printed record, it is alleged, that *the plaintiff, the W. L. Wells Company, corporation, sold and delivered to the defendant so many bales of cotton "for which the defendant agreed to pay the plaintiff" such a sum, etc.*

Here is one allegation by the plaintiff, corporation, of an express special contract on the part of defendant to pay so much money, such a sum, THE SUM AGREED ON.

The declaration, then, in the language of the law, is upon a special contract so laid in the complaint. It is not for the value of the goods in assumpsit upon a *quantum valebat*, which is always an implied contract to pay the value of goods delivered, the same to be assessed by a jury upon inquiry. It is an agreement to pay an exact sum for such a number of pounds of cotton already ascertained so that if there had been no answer filed, the judgment could have been entered, without inquiry, *for that exact sum.*

If the contract sued on had been an implied contract to pay so much as the goods are worth, the value of the same to be ascertained by a jury, the judgment for want of answer would have been by default and inquiry, and not a final judgment by default, as here. The distinction is clear between the two, the express and the implied contract.

In the face of this declaration, upon this express special contract, it is contended by the plaintiff, and so held by the court, on the circuit, that the plaintiff is not estopped to say there was no power to make this contract. The plaintiff *alleges* that it, the corporation, made the contract, which

it had no power, it is contended, to make. This is the proposition, the contention.

We maintain that the plaintiff, having sued upon the contract, the express contract, and not on a *quantum valebat*, the implied contract, can recover only on the contract, as alleged and proved, and is bound by its terms.

We are confident that no case can be found in the books contradictory of this principle.

In this connection it is important to inquire as to who made the contract; by, and through whom, was the contract sued upon, made? It was made by W. L. Wells, as testified to by the witnesses, and as shown by the correspondence between the parties, and as testified to by Love in the presence of W. L. Wells, the president of the company and manager, and, indeed, the only person in the company who was solvent, a man who, according to all the evidence, could make and unmake, take in, or turn out, at will, any member, of the firm, copartnership, or corporation.

We say, in the presence of W. L. Wells, because he was present at the trial, summoned as a witness, but not put on the stand to contradict one word, one thing testified to by John Love: The evidence shows that W. L. Wells was really the company and the company W. L. Wells. 95 Fed. Rep., 27; 13 Fed., 811, and 83 Fed., 556.

This contract was made by W. L. Wells, for the company and a part of it was, that fifty thousand dollars of the purchase-money, to be paid, on the contract, was to be in stock of the Loray mills.

The evidence to support this was the testimony of Love, the letters of Wells, the ratifications of, and acquiescence in, the same, by the company in Mississippi. Every dollar was paid in pursuance of and compliance with the contract as shown by *record evidence produced in court*, supported by the testimony of John Love, as we again submit, in the presence of W. L. Wells, who did not contradict a word he said, or deny a payment, as entered upon the books.

The principle of law above stated, to the effect that the plaintiff having sued on the contract, the express contract, and not on a *quantum valebat*, or implied contract, can recover only upon the express contract alleged in the complaint, is so well settled we hardly deem it necessary to cite other cases to sustain it, but in addition to the case already cited of Shonenger *vs.* Peabody, 14 Amer. State Rep., 88, and cases cited therein, we refer to the following cases:

See:

Washington, &c., P. Co. vs. Sickles, 10 Howard, 419.
School Fur. Co. vs. School Dist. (Neb.), 77 N. W., 72.
Johnston vs. Imp. Co. (Neb.), 68 N. W., 383.
Nat. Bank vs. Bank (Neb.), 80 N. W., 48.
Leavitt vs. Fairbanks (Me.), 43 Atl., 115.
Martin vs. Humphrey (Neb.), 78 N. W., 383.
Edgar vs. Breck (Mass.), 52 N. E., 1083.
Owens vs. Boyd Land Co. (Va.), 28 S. E., 950.
Evarts vs. Selover (Mich.), 7 N. W., 225.
Wheeler & Wilson vs. Aughey (Pa.), 22 Atl., 667.
4 *Thompson Corp.*, sec. 5303.
5 *Thompson Corp.*, secs. 6016, 6017, 6018.
Singleton vs. Bank (Ga.), 38 S. E., 947.
Landin vs. Bank (Minn.), 77 N. W., 35.
Rudasill vs. Falls, 92 N. C., 222.

In the last cited case, the principle herein contended for is clearly stated as follows:

"Where an agent exceeds his authority, his principal must either wholly ratify or wholly repudiate the transaction. He cannot ratify that portion of the contract which is beneficial to him and repudiate the remainder."

The plaintiff is bound by the allegation in the complaint. If so bound by it, how can it be contended that he had no power to make it?

The absurdity of the contention, we respectfully submit is shown in the statement, or the allegation, in the com-

plaint, that the contract was entered into between the plaintiff and defendant, and a recovery upon the same asked by the plaintiff; and, at the same time, and in the light of the same, the contention that there was no such contract, for the reason that plaintiff had no power to make it.

There is another proposition contended for here, that, we submit, is peculiar; and that is, as said by the court, in the opinion filed, that fact, that the defendant had dealings with the company estops it from denying its corporate existence; and, at the same time, maintaining that these same dealings, estopping, as they do, the defendant, do not estop the plaintiff in denying its power to make this contract. This, too, in the face of the fact that the action is based on the contract. There is, we most respectfully submit, no escape from the rule that if these dealings estop one they must the other.

Building & Loan Ass'n vs. Ebaugh, 185 U. S. Rep., 114.

The plaintiff's election thus to sue and to ratify the special contract, having once been made, cannot be recalled.

Rowland vs. Barnes, 81 N. C., 234.

Austin vs. Stewart, 126 N. C., 525.

IV.

The judge had no power or right to withdraw the consideration of the case from the jury and peremptorily to direct a verdict, in view of the evidence submitted in the case, even under the practice prevailing in the Federal courts. The evidence more than reasonably tended to establish the plea of payment, or the defense, as to credit for the stock subscription, and should have been submitted to the jury.

This question is raised by the sixth exception to the rulings of the court, the substance of which is that the court erred in the instruction to the jury that there was no evidence reasonably sufficient to establish the fact of payment,

by the defendant, of fifty thousand dollars, or any other sum, for the stock of the Loray mills, as alleged in the answer, for and in behalf of the plaintiff, W. L. Wells Company.

Where there are presented, by the testimony, matters of fact, vital to the controversy, upon which either party has the right to the opinion of the jury, it is error for the court to withdraw the case from the jury and direct a verdict for the other party.

Russell vs. Post, 138 U. S., 425.

When the evidence, or any inference that can be reasonably drawn therefrom, reasonably tends to establish the claim or defense, it is not within the province of the court to withdraw the case from the jury, but the evidence should be submitted to the jury to ascertain the facts of the case upon which the claim or defense is based.

Humiston vs. Wood, 124 U. S., 12.
R. R. vs. Powers, 149 U. S., 43.
Pythias K'ts vs. Beck, 181 U. S., 49.

We respectfully submit that the foregoing will show the writ of certiorari, as applied for in this case, should not be granted.

CHARLES PRICE,
ARMISTEAD BURWELL,
EDWIN CANSLER,
Attorneys for Respondents.

MAY 2, 1904.

(Supreme Court, [illegible])

No. 357.

W. L. WELLS COMPANY, Petitioner,

vs.

GASTONIA COTTON MANUFACTURING COMPANY.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

CHARLES PRICE,
Attorney for Respondent.

Judd & Detweiler (Inc.), Printers, Washington, D. C. 1898

(19,312.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1904.

No. 237.

W. L. WELLS COMPANY, PETITIONER,

vs.

GASTONIA COTTON MANUFACTURING COMPANY, RESPONDENT.

SUPPLEMENTAL BRIEF FOR RESPONDENT.

In the opinion filed in the circuit court of appeals it is said that the conclusion reached by that court rendered it unnecessary that it should consider or discuss any of the other assignments of error. (See page 21 of Brief for Respondent.)

If, therefore, this court shall conclude that the circuit court of appeals erred in its judgment because the petitioner was a corporation of the State of Mississippi, and, as such, could maintain in the Federal court this action against the respondent, the proper judgment will be to remand the cause with a direction to take jurisdiction and consider and determine the other assignments of error.

American Sugar Refining Company, petitioner, *vs.* The City of New Orleans, 181 U. S., 277.

The circuit court of appeals heard argument upon these other assignments of error, but its conclusion, to wit, that the petitioner, not being a citizen of the State of Mississippi, could not maintain its action in the circuit court of the United States for the western district of North Carolina against the respondent, a citizen of that State and district, rendered it unnecessary and perhaps improper that the circuit court of appeals should consider the other assignments of error, inasmuch as the judgment of that court remanded the cause to the circuit court in order that other parties might be made and the jurisdiction of the circuit court over the controversy maintained, if the real parties in interest so desired.

CHARLES PRICE,
Attorney for the Respondent.

Supreme Court of the United States.

No. 237.—October Term, 1904.

W. L. Wells Company, Petitioner, vs. Gastonia Cotton Manufacturing Company. } On writ of certiorari to the United States Court of Appeals for the Fourth Circuit.

[May 8th 1905.]

Mr. Justice Harlan delivered the opinion of the Court.

The plaintiff, the W. L. Wells Company, seeks in this action to recover a balance alleged to be due from the defendant, the Gastonia Cotton Manufacturing Company, on account of certain sales of cotton in the years 1899 and 1900.

The complaint averred that the plaintiff and defendant were, respectively, created and duly organized as *corporations*—the former, under the laws of Mississippi; the latter, under the laws of North Carolina.

The defendant admitted that it was a corporation, duly organized under the laws of North Carolina and a citizen and resident of that State, but averred that it had "no knowledge or information sufficient to form a belief as to the truth of the allegation contained in the first section of the complaint, to wit, that the plaintiff is a corporation organized under the laws of the State of Mississippi and a citizen and resident of that State, and, therefore, it denies the said allegation." The other paragraphs of the answer put in issue the allegations of the complaint touching the plaintiff's claim against the defendant.

There was another action in the same court brought by the W. L. Wells Company against the Avon Mills on account of transactions like those involved in the other case.

By consent of the parties and pursuant to an order of court the two cases were consolidated and tried together. In answer to questions propounded by the court the jury found that the W. L. Wells Company was, as alleged in the complaint, a corporation and a citizen and resident of Mississippi and entitled to recover the sum of $39,313.88. A judgment was rendered for that amount against the Gastonia Cotton Manufacturing Company—the Circuit Court holding, upon a review of the evidence in connection with the findings of the jury, that the W. L. Wells Company was a corporation of Mississippi, and as such entitled to invoke the jurisdiction of that court as against the defendant corporation of North Carolina. 118 *Fed. Rep.* 190.

The case was then carried to the Circuit Court of Appeals which adjudged that the plaintiff had failed to establish the allegations of the complaint as to its corporate capacity, and, therefore, was not entitled to sue in the Circuit Court in its alleged corporate name. Without considering the merits of the case, that court reversed the judgment for want of jurisdiction in the Circuit Court and the cause was remanded with liberty to the plaintiffs, if it was so advised, to amend the complaint by inserting the individual names of those constituting the company in whose name the action was brought, which being done a new trial should be granted; and if the plaintiff declined to amend, then the case was to be dismissed without prejudice. 128 *Fed. Rep.* 369. Subsequently, the present writ of certiorari was granted.

As the plaintiff was not entitled to maintain its action in the Circuit Court unless it was a corporation of Mississippi, (*Great Southern Fire-Proof Hotel Co.* v. *Jones*, 177 *U. S.* 449, 554, 556, *and the authorities there cited,*) the denial in the answer of knowledge or information sufficient to form a belief on that point put in issue the plaintiff's corporate character, within the meaning of the rule, no longer to be questioned, that for purposes of suing and of being sued in the courts of the United States the members of a corporation are to be deemed citizens of the State by whose laws it was created; and as the jurisdiction of the courts of the United States must always appear affirmatively, of record, it became necessary, under existing statutes and under the rules of practice and pleading in North Carolina, for the plaintiff to prove that it was a corporation of Mississippi. *Roberts* v. *Lewis*, 144 *U. S.* 653, 656; 17 *Stat.* 197, *c.* 255, *Act of June 1st* 1872; *Rev. Stat.* 914; 18 *Stat.* 470, *c.* 137, *Act of March* 1875; *Code of Civil Procedure, N. C.* §§ 133, 243, 260, 276; *Southern Pacific R. R. Co.* v. *Denton*, 146 *U. S.* 202. It was so held, and correctly, by the Circuit Court of Appeals. 128 *Fed. Rep.* 369.

Was the plaintiff a corporation of Mississippi within the meaning of the above rule? In that State individuals may become incorporated for certain purposes under general laws. The first step there towards incorporation is to apply to the Governor for a charter, stating the purposes for which the corporation is to be created. That officer then takes the advice of the Attorney General as to the constitutionality and legality of the provisions of the proposed charter. If the Governor approves the charter, and causes the Great Seal of the State to be affixed thereto by the Secretary of State, it would seem that the process of incorporation then becomes complete. Charters of incorporation in that State are required to be recorded in the office of the Secretary of State and in the office of the clerk of the Chancery Court of the county in which the corporation does business. *Anno. Code of Miss.* 1892, *c.* 25.

It appeared in evidence that W. L. Wells, John T. Wells and George Butterworth submitted to the Governor of Mississippi, to be referred to the Attorney General of the State, the following form of charter:

"§ 1. Be it known and remembered that W. L. Wells, John T. Wells and George Butterworth, their associates and assigns, are hereby created a body politic and corporate, under the name and style of W. L. Wells Company, and by that name shall have succession for fifty years, shall have power to sue and be sued, contract and be contracted with, may have a corporate seal, and break and alter the same at pleasure. § 2. The capital stock of said corporation shall be fifty thousand dollars, divided into shares of five hundred dollars each, and as soon as ten thousand dollars of said stock is subscribed and paid for, said corporation shall have power to commence business. § 3. Said corporation is formed for the purpose of conducting a general cotton business, and may buy and sell cotton, and may transact a cotton factorage business, may advance money or supplies for the purpose of controlling shipments of cotton, may take and receive mortgages or deeds of trust upon property to secure said advances, and generally may have all powers conferred by Chapter 25 of the Annotated Code of 1892 necessary and requisite to carry out the purpose of said corporation. § 4. The board of directors of said corporation shall consist of three persons, whose numbers may be increased at any time by a majority vote of the stockholders, and said directors shall have power to elect all necessary officers, and prescribe the duties, salaries and tenure of such officers."

The Attorney General having certified that the proposed charter of incorporation was not repugnant to the Constitution or laws of the State, it was approved by the Governor, and such approval was attested by the Secretary of State, the Great Seal of the State being thereto affixed. The Secretary thereupon certified under the Great Seal that the charter "incorporating the W. L. Wells Company, was, pursuant to the provisions of Chapter 25 of the Annotated Code, 1892, recorded in the Book of Incorporations in this office." It was also recorded in the office of the clerk of the proper Chancery Court.

The contention of the defendants in the court below was—and their contention here is—that the subscription of $10,000 to the capital stock of the W. L. Wells Company and the payment thereof, was a condition precedent to the company's becoming a corporation; that is, it could not become a corporation *de jure* until such subscription and payment. And this view was sustained by the Circuit Court of Appeals, which said in its opinion: "It is very clear from this that having a charter like this conditioned upon the payment of $10,000 in subscriptions, then these men undertook to exercise powers in the charter, without fulfilling or attempting to fulfill the conditions precedent in the charter. That even

when they had made money in the business they ignored the corporation altogether, and drew the money out of the business as if it belonged to them and not to the corporation. The charter never went into operation, and the corporation never became a legal entity. More than this, these assumed corporators went on in business, contracted obligations in the name of the so-called corporation which did not possess a dollar of property, or have any mode of meeting a debt, thus seeking to cloak their transactions under an assumed corporate name, and avoid in this way all personal responsibility. At the same time two of them were, in a business sense, irresponsible. It would seem that this transaction was an abuse of, and in fraud of, the law. And that Wells Company had never and could not have any legal existence. When a corporation is formed under an enabling act, all the mandatory provisions of the statute must be complied with." 128 *Fed. Rep.* 369, 372.

We are of opinion that the Circuit Court of Appeals erred in holding that the charter of the W. L. Wells Company made it a *condition* of its becoming a corporation that $10,000 of capital stock should be subscribed and paid for. The question was not as to the good faith of the incorporators, nor whether the company was organized in fraud of the law. Those were not matters to be inquired into in ordinary suits between the company and individuals or corporations. If the organization of the company as a corporation was tainted with fraud, it was for the State, by some appropriate proceeding, to annul its charter. The question before the court below was whether the company was, technically, a corporation, and that depended upon the legal effect of the words of its charter. The first section of that charter expressly declares that the incorporators, their associates and assigns, "are *hereby created* a body politic and corporate, under the name and style of W. L. Wells Company, and by that name shall have succession for fifty years, shall have power to sue and be sued, contract and be contracted with, may have a corporate seal, and break and alter the same at pleasure." These words can have but one meaning. They manifest the purpose of the Legislature to create a corporation. Substantially the same words in a charter granted by Congress were held to create a corporation. *Minor* v. *Mechanics' Bank of Alexandria*, 1 *Pet.* 47, 63. The second section of the company's charter did not modify the provisions of the first section. It did not *require* the payment of a given amount of stock subscriptions before the company should be considered *in esse* as a corporation. It did nothing more than confer the privilege or power of commencing business when a specified amount, less than the whole, of its authorized capital stock was subscribed and paid for. The company was created a corporation by the previous section, with power in its corporate name to sue and be sued, contract and be contracted with; and, under the general statutes of the State, it came into existence as a corpo-

ration immediately upon its charter being approved by the Governor of Mississippi and such approval certified by the Secretary of State under the Great Seal of the State. If the commencing of the business for which it was incorporated before a certain amount of capital stock was subscribed and paid for was in violation of the company's charter, that was a matter for which it could be called to account by the State, and did not affect the existence in law of the company as a corporation. Of course, if the charter of the company had made it a *condition precedent* to its becoming a corporation that a certain amount of capital stock should be subscribed and paid for, a compliance with that condition would have been necessary before the company would have become a corporation entitled to sue and be sued in the courts of the United States. But, as we have seen, the charter in question prescribed no such condition. If the Legislature had intended to withhold corporate existence until a given amount of capital stock was subscribed and paid for, that intention, we may assume, would have been manifested by clear language. We do not feel at liberty, by mere construction, to qualify the explicit declaration in the first section of plaintiff's charter as to the corporate existence thereby created. We therefore hold that under the statutes of Mississippi the only conditions precedent to the existence of the corporation was the approval by the Governor of the State of its proposed charter and the certification of that approval under the Great Seal of the State.

It is said that the interrpretation we have given to the charter of the W. L. Wells Company is not in harmony with the principles announced by the Supreme Court of Mississippi. We are referred in support of this view to *Perkins* v. *Sanders*, 56 *Miss.* 733, 738–9, which was a suit by a creditor to enforce the personal liability of stockholders for the debts of a certain company. But there is nothing in that case clearly indicating that the Supreme Court of Mississippi would, if this question were before it, hold the requirement of the subscription of $10,000 of stock and its payment before commencing business to have been a condition precedent to the plaintiffs becoming a corporation. That court, in the case cited, referred to a section of the charter of the company there in question, providing that the persons named in it, and all others who then were or might thereafter become associated with them, and their successors and assigns, "be and they are hereby created a body politic and corporate, under the name," &c.—a provision like that found in the plaintiff's charter. The court said: "This was no proposition to create a corporation upon the performance of certain conditions, but it was itself the creation of a corporation, requiring no other act to be performed by the corporators than their acceptance of the charter, and this even was unnecessary, if, as it is probable, the corporators had applied for the grant of the charter, and thus accepted it in advance. . . The distinction between the two classes of charters is thus seen to be that

in the first class the charter is mere permission on the part of the Legislature for the formation of a corporation upon the doing of certain acts prescribed in the charter as precedent conditions, and, as a necessary result, no corporate act can be done until those conditions have been performed, except such as may be expressly permitted by the charter; and, as to those acts, it would be considered that the corporation had an existence before its full investiture with its corporate franchises. In the latter class in which is this company the corporation is in existence for all the purposes of its creation from the beginning, except so far as there may be restraints placed on it by the charter, either expressly or by plain implication."

It thus appears that the Supreme Court of Mississippi, in the case referred to, decided that where acts are required to be performed before the corporation comes into existence, no corporation is created or can exist until those acts are performed. In this general view we entirely concur. But the question remains whether the particular charter here in question made it a condition precedent to the existence of the W. L. Wells Company as a corporation, that a certain amount of its capital stock should be subscribed and paid for. As already indicated, we are of opinion that no such condition precedent was prescribed, and that under the statutes of Mississippi and independently of the subscription of a certain amount of stock and its payment, the plaintiff became, in law, a corporation when the Governor approved its charter and the fact of such approval was certified by the Secretary of State under the Great Seal of Mississippi. It could not thereafter dispute its liability for acts done by it in its corporate name nor be denied the right to sue in that name.

As the Circuit Court of Appeals proceeded on different grounds as to the jurisdiction of the Circuit Court, its judgment must be reversed, and the case remanded, with directions to that court to set aside its own judgment, and for such further proceedings touching the merits of the case as may be consistent with this opinion and with law.

Reversed.

True copy.

Test:

Clerk Supreme Court, U. S.